Google Inc. et al v. Egger et al
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CENTER FOR CONSTITUTIONAL
RIGHTS, et al.,
Plaintiffs,

v. 06-CV-00313 (GEL)

GEORGE W. BUSH, et al.,
Defendants.
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New York, N.Y.
September 5, 2006
2:00 p.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

CENTER FOR CONSTITUTIONAL RIGHTS
For Plaintiffs
SHAYANA KADIDAL

NATIONAL LAWYERS GUILD
For Plaintiffs
MICHAEL AVERY, Professor of Law

U.S. DEPARTMENT OF JUSTICE
For Defendants
ANTHONY J. COPPOLINO, Special Litigation Counsel

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(Case called)

THE CLERK: Counsel, please state your names for the record.

THE COURT: Everyone be can be seated, please. Counsel?

MR. KADIDAL: Good afternoon, your Honor. My name is Shayana Kadidal for the plaintiffs, and I'm with the Center for Constitutional Rights.

THE COURT: Okay. Thank you, Mr. Kadidal.

MR. AVERY: Your Honor, my name is Michael Avery. I'm with the National Lawyers Guild representing the Center for Constitutional Rights.

THE COURT: Thank you, Mr. Avery.

William Goodman on behalf of the plaintiffs, your Honor.

THE COURT: And Mr. Goodman. And for the government?

MR. COPPOLINO: Good afternoon, your Honor. Anthony Coppolino from the Department of Justice Civil Division for the government.

THE COURT: Good afternoon, Mr. Coppolino.

MR. NICHOLS: Your Honor, Carl Nichols also with the government.

MR. HUNT: Your Honor, Joseph Hunt, also with the government.

MR. TANNENBAUM: Good afternoon, your Honor. Andrew

Tannenbaum, also with the government.

THE COURT: Okay. Good afternoon, gentlemen.

Before hearing from the parties, I want to say a few words about what we're doing here and what I expect to happen today. First, I feel that I owe the parties some explanation as to the timing of this proceeding. The case has been pending for quite some time, no doubt to the plaintiffs' dismay. This case raises difficult and important issues, and it seemed important to me not to rush to deal with issues that might be resolved or altered in some way politically by a change in the law.

The plaintiffs argue here that the President of the United States is violating a law passed by Congress and signed into law by the then president. The president argues in response that his actions are both lawful and important to the national security.

When the case was first filed, it seemed very possible that Congress would respond to the national security interests at stake by passing legislation that would make the law clearer, at least on its prospective basis, one way or the other, and I felt it would be imprudent for a judge to rush to resolve difficult statutory and constitutional issues that might be mooted or radically transformed by Congressional action. That has not happened. I certainly mean no criticism of Congress, which is perfectly entitled to leave the law as it is if that's what Congress wants to do. But at any rate, it became reasonably clear as the summer began that there was no immediate prospect that the courts would not have to resolve the issues as posed.

Then, at the government's request, I waited for the Judicial Panel on Multidistrict Litigation to decide if all the cases around the country raising these issues should go to a single court. As I perhaps should have foreseen, the panel's action in this regard was not conclusive and it seems that further proceedings before that panel are anticipated to decide whether this case will be transferred along with cases brought against private third parties. Again, I have no complaint with that decision or criticism of that, and maybe it's something I should have foreseen from the posture of the case, but it seems that it will not be until, at the earliest, sometime in mid to late October before that matter is resolved. And it seems to me that I've done what I responsibly could to avoid precipitative action. There's only so long that a court can justify deferring action on a matter within its jurisdiction. The courts have an obligation to proceed to decide the cases before them.

Plaintiffs say their rights have been violated by unlawful action. Both sides have filed various motions asking the Court to do various things or not do various things, and it seems to me that it's time to proceed with those motions.

Second, I want to say a word about what I've done and not done in preparation for these proceedings so that the parties have some understanding of what I know and don't know. I have read all of the parties' extensive public briefing and I have at least surveyed most of the numerous amicus briefs and read many of them in detail. I've reviewed the supporting materials submitted by the parties in the public record and a great deal of the relevant case law.

What I have not yet done is to read the government's classified submissions. It's not at all, I hasten to add, that I refuse to read them or anything like that. I believe the submissions are perfectly proper and appropriate and I will most assuredly read them before taking any action on any of these motions. But this is a public argument and I did not want to risk either inadvertent disclosure of classified material or even the appearance of such disclosure. In an oral exchange, unlike in a written opinion, the parties or the Court could -- the Court is what I'm really worried about at this moment -- could inadvertently let something slip out without the opportunity to think about it and check it and make sure that that's not something that was classified. Moreover, in this kind of argument, either the parties or the Court might raise certain hypotheticals or assume certain facts or suggest certain possibilities. As the government argues and as I know from previous experience with highly classified materials, sometimes information is classified to protect sources or intelligence methods or because actions that are commonly assumed to have taken place or are guessed at ought not be officially acknowledged. I don't want there to be any ambiguity or any inference that if I ask a question during this proceeding, what if the president does this or that for such-and-such reason or suppose that the classified program at issue really looks like this or really looks like that, if I ask such questions, I don't want it to be assumed that this represents any kind of signal that that concern was raised by my reading of classified information. So I want to emphasize that I am so far as ignorant as the plaintiffs or the public of what is in the government's classified submissions. I know nothing more at this point than is in the public record.

Finally, as to our procedure here today, this is not a public debate about the wisdom or the appropriateness or the desirability of certain forms of electronic surveillance. In fact, I don't anticipate this afternoon that we're even going to have a full airing of the legal arguments that are relevant to this case. The parties have submitted hundreds of pages of briefing on the legal issues in the case. I have read them. And so I believe I understand the basic positions of each side and there's not much need for me to hear the parties repeat in a condensed form what they've already put in detail in writing. I expect to spend most of our time this afternoon asking specific questions that I had after reading those papers. This may be frustrating to spectators because it will not necessarily allow for a clear flow of debate nor for a full presentation of issues by either side or of the positions of either side, but the purpose here is to help me to decide the issues presented by the case by getting answers or clarifications of particular points of concern to me.

Finally, for the parties, I do not expect that we will address all the issues in this case this afternoon, certainly not in any detail. I intend to focus mostly on what may be called the threshold questions raised by the government's motion to dismiss and on the substantive questions of statutory interpretation and of presidential power that are raised by the motions. I expect to devote little time to the Fourth and First Amendment issues raised by the plaintiffs' position.

There are a lot of legal issues in the case. They're interrelated in complicated ways. There are a variety of ways that the matter before me might be resolved without reaching all of the issues in the case. So I want to take them up in the order the parties have raised them and in the order that I think is logically and analytically appropriate and see what progress we can make. It's entirely possible that I might later order additional arguments on matters that we don't get to today.

So I want to start with the government's motion to dismiss, which asks me to dismiss the case without reaching the merits on the ground that the case necessarily turns on facts that may not be disclosed because of the state secret privilege.

I want to quote a sentence from the government's reply brief at page 2 and see whether this represents common ground or is contested. The government says this: Whether this case may proceed turns on whether the evidence necessary to decide the claims implicates facts that must remain secret in the interests of national security. And I think from the briefing -- and I want to confirm this with the parties, that I'm correct to assume that this is common ground as a statement of law. And it's not a trick question.

I put it to the government first. Mr. Coppolino, I take it that that means that the government is not contending that this is a case like Totten v. United States, where there's a categorical bar to deciding the case; it's just that in the government's view, the merits of the various arguments turn on particular information as to which the privilege would properly be asserted or is being asserted.

MR. COPPOLINO: Your Honor, it's not a case like Totten in the sense that the categorical bar in Totten applied to a specific type of relationship between the government and an entity, an espionage relationship, and certainly that is not at issue in this case.

However, I would hasten to add that Totten has been cited in other state secrets cases for the proposition that, where the very subject matter of the lawsuit implicates state secrets from the beginning, it cannot proceed. There are three grounds for dismissal based on state secrets.

THE COURT: Well, wait, wait, wait. I mean, I hear that and I understand that you've quoted it to that effect, but going back to what I just read, the grounds that you are actually raising here have to do with the plaintiffs can't establish standing without state secrets; the evidence necessary for them to establish their position on the merits requires state secrets; what you would need to do to respond to the summary judgment motion requires state secrets. These are the three things you were going to say, right?

MR. COPPOLINO: That's correct, your Honor, but I'd like to just add this conclusion: As a result of those three things, we also believe the case falls into the category of whether the very subject matter implicates the state secret because --

THE COURT: Well, but, I mean, in order to decide whether this rhetorical thing about it's in the category works or not, I have to answer those three specific questions --

MR. COPPOLINO: Yes.

THE COURT: -- about what is necessary to decide particular issues that might come up in the case.

MR. COPPOLINO: Yes.
THE COURT: Okay. And in order to do that, I realize you've raised this at the very beginning of the case, although -- and the plaintiffs devote a lot of rhetoric to the idea that you're trying to cut this off at the beginning and so on. But in a certain sense it isn't the beginning of the case because they're asking for summary judgment. They think it's the end of the case. And you're raising it in response to their particular arguments, right?
MR. COPPOLINO: We would have filed our motion to dismiss precisely the same even if they hadn't moved for summary judgment. Our motion to dismiss is responsive to their motion for summary judgment in the sense that, having set forth their particular claims and arguments in favor of them, we have gone through each of those and identified for you why we think facts are -- state secrets are necessary to resolve that.
I would hasten to add as a procedural matter, your Honor, we think that our motion is the threshold motion to be decided, not only because it addresses the issue of standing but in particular because where privilege is asserted and the issue is the availability of evidence, it seems to us that that has to be decided before you can reach the merits.
THE COURT: Well, let me talk about the standing issue first and maybe that will make my question a little clearer. As I understand the plaintiffs' position, the plaintiffs are

not arguing that they have standing because they've been overheard, they are not alleging that they've been overheard, they're not even alleging on information and belief that they've been overheard. Rather, what they're saying is that they have standing because of a particular theory that they have and particular allegations that they make. I guess I should check out, Mr. Kadidal, I'm right about that, am I not?

MR. KADIDAL: Well, actually, I believe at paragraphs 5 and 43 of the complaint, we do indicate that, you know, on information and belief that we would have been -- that we are likely to be targets of this program and therefore that we believe that we were targets of the program.

THE COURT: Well, you say --

MR. KADIDAL: But it's not essential to our standing.

THE COURT: You say you're likely to be, but are you alleging that you've actually been overheard?

MR. KADIDAL: I believe we do allege that that is something that, you know, on information and belief, we probably could prove if --

THE COURT: Well, do you contest that it would be proper for the government to assert the state secrets privilege with respect to confirming or denying who exactly has or has not been overheard under this program?

MR. KADIDAL: Well, we don't think it's necessary to establish our standing.

THE COURT: I didn't ask you that. I asked you, are you contesting that that would be a proper assertion of the state secrets privilege?
MR. KADIDAL: I think we are.
THE COURT: All right. So that's an issue that maybe I have to address.
But Mr. Coppolino, to get back to where I was, I understand that you argue that the plaintiffs' theory of standing is inadequate and, based on their theory, the case should be dismissed; if that's the only ground for standing, they're out of court, right?
MR. COPPOLINO: Whatever their grounding for standing is, our argument --
THE COURT: No, no, please, answer the question that I asked.
MR. COPPOLINO: Yes.
THE COURT: I'm asking, if the plaintiffs' theory as to why they have standing is incorrect and they don't have standing, then the case needs to be dismissed without reaching state secrets issues.
MR. COPPOLINO: That's correct. It could be dismissed on the allegations in the pleading as insufficient to establish standing. Under --
THE COURT: And if I disagree with you and find that those allegations are sufficient to establish standing, then

the case can go forward at least that far before reaching any state secret issue; in other words, the standing argument stands alone.

MR. COPPOLINO: I disagree in this respect: The standing issue then becomes a fact issue and we'd move for summary judgment as well on the state secrets grounds, and as in Halkin in the DC Circuit, the fact issue then becomes whether state secrets are necessary to adjudicate the issue of standing as a factual matter.

THE COURT: Well, which factual matters that they allege, that they allege, not what you think is necessary for them to establish as standing, but what they allege, how does state secrets bear on that?

MR. COPPOLINO: In two ways, your Honor. They do allege that they've actually been intercepted on information and belief. That's, as Mr. Kadidal pointed out, paragraph 43 of the complaint. With respect to that allegation of injury, the primary defense is that state secrets are not available to confirm or deny whether they've actually been subject to surveillance.

THE COURT: Let's suppose I'm with you on that. Let's suppose for the moment that I would sustain that allegation or that assertion of privilege and that that allegation falls by the wayside. After all, the plaintiffs say that's not necessary to their standing case. So on their theory, where do state secrets become relevant to decide the factual issues which -- and I'm going to try and characterize their argument and I'll have to have them do that again later, because maybe I have it wrong, but as I understand it, the argument is that the very existence of this program puts them in a position where they can't do certain things vis-`-vis their clients or their clients won't do certain things vis-`-vis them and that is an injury.

MR. COPPOLINO: If you were to conclude that the allegation is sufficient that -- which we would contest, and have contested --

THE COURT: I understand that.

MR. COPPOLINO: -- then the state secrets issue there goes to the scope and operation of the program. Because they're contesting that the scope of the program covers them. That is inherently a factual issue. It is not enough to say that the scope on the public record includes the surveillance of Al Qaeda. Rather, it is necessary, it would be something that we would demonstrate as a factual matter, if we could, how the program works, what is its scope, does it target people in the manner in which they have alleged, for example, attorneys representing former Guantanamo detainees or other types of detainees. Does it target family members, witnesses, expert witnesses, counsel, does it work in the way they've alleged, and if we can show you as a factual matter that the scope and operation of the program was much narrower, if we could show you that the way NSA goes about picking targets, how they choose those targets and how they proceed to surveil those targets would demonstrate to you that their allegations are unfounded, that they're built on speculation; that if we could show you that to defend that involves state secrets, as we're convinced it does, then that second allegation of injury, that they're threatened by the existence of the program, also fails on state secrets grounds.

In fact, I would say, your Honor, that while I think we have a very substantial defense that that allegation of injury by the existence of the program is foreclosed by Laird on the face of the complaint, nonetheless, even that allegation runs into factual issues because it inherently puts the scope and nature and operation of the program at issue. And just one quick example --

THE COURT: Excuse me. Is there anything in the classified submissions that describes any of that for my purposes?

MR. COPPOLINO: Well, the classified submission I can just say generally describes --

THE COURT: Well, I want to be very careful, and I appreciate that you need to be very careful. I'm trying not to ask anything about the substance of what's in there. I guess what I'm trying to get at in a very general way, not just about this question, it has not been my impression from the public filings that any classified submission by the government in this case sets forth -- how to put it -- what you would have in your summary judgment papers in full if there were no classification or state secret issues. Do you understand what I'm asking?

MR. COPPOLINO: I do understand what you're asking, your Honor, and while I would not describe our submissions as a full summary judgment presentation, I would say to you, though, that we have submitted a classified version of our brief which attempts to plug in the facts at the particular point where we say facts are necessary both as to standing and on the merits.

And in addition, to go back to your original question, the declarations we've submitted describe the nature, operation, scope of the program in detail. And this is the very evidence that we believe would be necessary --

THE COURT: Okay. That's the answer to my question. I appreciate it.

All right. Let me turn to Mr. Kadidal for a moment with respect to some both factual and legal questions about your position on standing. First of all, is it stated in the record that you have actual clients that you have to communicate with who you allege are either members or associates of Al Qaeda or who have been accused by the government of being members or associates of Al Qaeda?

MR. KADIDAL: Right. We certainly don't allege that they're members of Al Qaeda, but the government does. And our contention, obviously, and here in the lawsuits in which we work on behalf of those clients is that in fact the government, you know, hasn't produced any evidence they are member of Al Qaeda, and insists it doesn't have to. But just to give you some examples, Maher Arar is probably the most prominent --

THE COURT: Mr. Arar is the one I focused on most in your papers. On page 10 of your summary judgment brief, you say the government asserts that Mr. Arar is associated with Al Qaeda, but at least at that point there's not a citation to the record or to some other place that says, here's where they did that. Is that something that is in the record, or can you tell me where and when the government has said that about Mr. Arar?

MR. KADIDAL: Sure. I can tell you that in open court in the proceedings in Mr. Arar's civil suit against the government, the government's attorneys stood up and announced that he was a member of Al Qaeda, and I believe they've done that repeatedly in their papers in that case.

THE COURT: That's somewhere in the record or if it's not, you can support it?

MR. KADIDAL: Right. I think it's in the public record at some point.

THE COURT: Are there other people in that category, again, people that the government has publicly indicated are associates of Al Qaeda?

MR. KADIDAL: Sure. Well, the government and the media has indicated that Mohammad al-Qahtani, a Guantanamo detainee, a relatively prominent Guantanamo detainee, whose interrogation logs are published in Time magazine, that he is a member of Al Qaeda. I don't believe they've said that directly in any court filings. However, the government has indicated that basically all Guantanamo detainees are either considered to be associated with the Taliban or with Al Qaeda and that the Taliban is an organization that's considered to be associated with Al Qaeda. And therefore, in Alberto Gonzales' public description of the scope of the program, he said, you know, the surveillance is directed against persons when the executive has a reasonable basis to conclude that one party of the communication is a member of Al Qaeda, affiliated with Al Qaeda or a member of an organization affiliated with Al Qaeda or in support of Al Qaeda. And that's a relatively narrow characterization of the target class for this surveillance. There are broader ones we cite in our summary judgment brief.

But I think it's important to point out to the Court that the action that causes injury to us is the public announcement of the threat here. Essentially, it's no different than if the president, you know, published something in the Federal Register saying what Alberto Gonzales said in that press conference, that we are intending to surveil anybody who's, you know, a member of Al Qaeda or an affiliated organization or anyone associated with any of those organizations.

THE COURT: So you're saying you're injured regardless of whether there even is such a program. Your injury stems from the announcement of the program.

MR. KADIDAL: That's right. If the government came out tomorrow and said, look, we were only kidding about this whole thing, I think that we still are looking at, you know, the injury from the countermeasures that we as attorneys have a professional responsibility to take. To then --

THE COURT: Right. The only thing that's illegal, according to you, I take it, is if they're actually doing it. FISA doesn't say, the government shan't ever pretend that it's engaged in surveillance of XYZ without getting a warrant first; it says they can't do it.

MR. KADIDAL: Right. We're still -- obviously, we still have an injury that comes from a government action that I believe would probably still be actionable under --

THE COURT: But it may be actionable, but there has to be a connection for you to have standing between the injury and the illegality that's asserted, right?

MR. KADIDAL: Right. Well, first of all, I think still our First Amendment claims would be there as to that sort of action. But --

THE COURT: I mean, suppose the program turns out to be something of a paper tiger. Suppose it turns out that yes, the president has created this program in the belief that certain surveillance may need to be done that's otherwise prohibited by FISA and that the way that it has been described in public by him and by the attorney general and others sets forth the justification in political and/or legal terms for doing it, that it's got to do with Al Qaeda members and so on. But the actual program, let us hypothesize, only targets certain particular core Al Qaeda members who the government has reason to believe have contact with certain people in the United States and it's not at all that once somebody is identified as Al Qaeda, they're on any phone that that person might ever hit in the United States. It's just, they think they know who Osama bin Laden in person is talking to in the United States and that's what they're on about. If that were so and that were publicly announced and that were not any kind of secret, you wouldn't have much injury, right?
MR. KADIDAL: If the really sort of qualified version that you're describing was publicly announced?
THE COURT: Yes.
MR. KADIDAL: Well, you know, I think some of our clients do fall into that sort of core, you know, category, at least as far as the government believes. Certainly someone, you know, like al-Qahtani who they have, you know, alleged in

the media is a 20th hijacker candidate and certainly the associates of his or family members or whoever we might need to interview in the course of, you know, sort of carrying out his litigation, his habeas petition, those individuals that we need to communicate with, those communications might still fall into that very, very narrow category.

But be that as it may, it's not the case we're faced with here. We're faced with a relatively broad program as it's been announced by the attorney general, by General Hayden and so forth. And I think it's really no different than the president, you know, sort of publishing that as a surveillance program that the government is about to undertake or is undertaking in the Federal Register.

THE COURT: And if the government did announce this program in the Federal Register, as you say, in the terms in which it's been stated by the attorney general, your position is, number one, that violates FISA, and number two, the creation of that program is what creates the inhibitions on communication and so forth that constitute your injury.

MR. KADIDAL: Absolutely. I mean, it's the threat that creates the injury, in the same way that the Ninth Circuit in the Presbyterian Church case said that the threat of future surveillance that was implicit in the fact that the church had been subject to infiltration is what drove away other parishioners, that is what caused the clergy members to have to spend time dealing with the fears of surveillance among parishioners.

THE COURT: One of the things that the government argues in its papers is that you can't really be serious that before -- I'm characterizing their argument -- that before this program was announced, you didn't have to take basically similar measures in protecting attorney/client confidentiality. Are you taking the position that before the announcement of this program, it was consistent with your professional obligations to talk to any of these people that we've been talking about so far or any of the witnesses in their cases without any concern that you were being intercepted pursuant to FISA or Title III or by foreign intelligence services that might cooperate with the United States? This was just not -- did this at least, whether it was a concern or a possibility, this was not something that an attorney needs to take countermeasures against before having a confidential communication with a client.

MR. KADIDAL: Right. Well, you know, obviously that's not the case for all communications prior to the announcement of this program and, you know, we're not here to get into details about what we did or didn't do prior to the program. But I think that argument from the government fails for a number of reasons, some of which we've laid out in our briefs.

First of all, probably most importantly, the measures that our government could take to carry out lawful surveillance under FISA or Title III all include statutory minimization requirements that are specifically there to protect the confidentiality of privileged communications. And those are specifically judicially overseen minimization requirements, right, so when we talk in our brief about how judges ask for returns on these warrants, they supervise how the minimization procedures are being implemented. There's a little bit of a back-and-forth process that's contemplated. Obviously it's a little ambiguous how these things are implemented in practice, but that's the general sort of --

THE COURT: But your answer is privileged conversations are -- attorney/client privileged conversations are off limits under FISA and Title III.

MR. KADIDAL: Right. That's basically it. And --

THE COURT: And are they not off limits under this program?

MR. KADIDAL: Well, the one thing we know about this program is that, you know, while there have been claims made that there are, you know, minimization aspects to it, they're not judicially supervised minimization procedures. By definition --

THE COURT: But we don't know whether this program would categorically exclude attorney/client communications based on anything in the public record, granting that there's

no judicial supervision over how that minimization would be done, assuming it is done, do we? We don't know that, do we?
MR. KADIDAL: It's funny that you use the word categorically exclude because in a series of answers which we cite I believe in our opposition brief -- these were answers that the justice department submitted in response to questions from minority members of the House, I believe, and they said that in fact, attorney/client communications and also doctor/patient communications were not going to be categorically excluded from the scope of the program, or were not categorically excluded from the scope of the program. So there is something in the public record that speaks to that directly.
THE COURT: Okay. And so your position on that point, at any rate, is that at least as regards what the United States government does, the Terrorist Surveillance Program permits, as has been stated in public record, the capture of at least some attorney/client communications, while FISA and Title III do not.
MR. KADIDAL: Right. I wouldn't say that categorically about FISA and Title III. I mean, obviously if there was implication --
THE COURT: There are circumstances under which such communications might be overheard and might even be legally overheard and legally usable, but basically the minimization

provisions make strenuous efforts to exclude that, whereas under this program, the public record suggests that that is not done.

MR. KADIDAL: That's right. And, you know, obviously I think the most important point is that the fact that whatever minimization is taking place behind the scenes with the NSA program is not judicially supervised.

THE COURT: Okay. All right. The other thing I wanted to ask you is, can you, just as succinctly as possible, in simple words that I can really grasp in a practical manner, how is this different from Laird? That's the heart of the government's case, it seems to me, is Laird v. Tatum says, as they read it, you just can't get standing by saying the government has announced some kind of program and we're worried and our people are worried that we're in it and that chills us in various ways. That's how they read Laird. And there's a lot of language in Laird, at least if you take out the cryptic "without more," that sounds like that's what it's saying. So what's different about this case? Forget the specific language of Laird for a moment. How do you distinguish the facts of Laird from the facts of this case in such a way that there was no injury granting standing in Laird and there is injury granting standing here?

MR. KADIDAL: Right. Well, I mean, I think the most important aspect here is that, you know, Frank Askin, bless his soul, stood up in front of the Supreme Court and said, these are people who are not cowed by this surveillance, they are here to speak on behalf of others who are chilled by the existence of this sort of Army surveillance, Army intelligence program.

If you look at Laird, I mean, the government tries to characterize Laird basically as, you know, setting forward this rule that any governmental exercise of power has to be either regulatory, proscriptive or compulsory in order to create harm that could underlie standing, that in a word could allow you to maintain standing, and that's absolutely not the case for the reasons we lay out in our reply brief. We cited a number of cases, Ninth and Tenth Circuit cases in particular, where they say, in fact --

THE COURT: You've got your Presbyterians from the Ninth Circuit, he's got his Presbyterians from DC.

MR. KADIDAL: Actually, the Presbyterians in DC were our Presbyterians, as it works out, although, again, I don't think that their allegations there were particularly strong in the DC United Presbyterian Church case. Their allegations of harm were actually relatively weak. But if you look up and down the Laird opinion, that can't be the holding because if it were, the Court would have announced it in a very succinct fashion. But instead, they look at the sort of allegations of harm in a kind of more holistic manner and I think that's consistent with what the Supreme Court does in all cases, including the --

THE COURT: I'm with you on that. That is, I don't think that this case can be governed or any case can be governed by taking some phrase, whichever side it favors, out of Laird and saying, there's the rule, now we plug in three facts and we get an answer. But what I'm really trying to get at is, what was the problem in Laird? Why was Laird so much worse a case for the plaintiffs than yours? Is it just that they conceded that they were not chilled? In which case it also would have been a very easy case to decide, I suppose, and it wasn't decided, as far as I can see, on that ground. They admit they are not chilled, end of story, they're not injured, everybody goes home. It was decided on a different holistic view. So what fell short in Laird that they didn't have that you've got?

MR. KADIDAL: Right. Let me say something general about this and then move to what I think was specifically absent in Laird, or a series of things that were specifically absent. The Supreme Court said, or Chief Justice Burger said, allegations of a subjective chill are not an adequate substitute for a claim of specific present subjective harm or threat of specific future harm. And this notion of subjectivity runs throughout Laird.

I think Laird and the subsequent cases show a concern about the objectivity of two elements in the analysis here. First is that the fear causing plaintiffs to be deterred from acting should be objectively reasonable; and second, that the harm asserted should be something tangible, objective in that sense, you know, not necessarily sort of vague psychological injury or something of that like but instead have the what the courts refers to, the Supreme Court refers to in subsequent cases as concrete harm.

So you've got the objectivity of the fear, and you've got the objectivity of the resultant harm, right? So, and I think that theme runs throughout the cases from the, you know, the environmental cases to all the other standing cases that the Supreme Court has decided over the years since Laird.

So if you look at the facts in Laird and tie it back to this, you've got, first of all, the fact that there wasn't an actual chill there and, you know, we cite not only places that the Supreme Court describes that in somewhat ambiguous terms but maybe the slightly stronger version that the DC Circuit, slightly stronger description of the fact that they basically weren't chilled that the DC Circuit puts forward. We cite those in our briefs. And then there are factors that the Supreme Court found would make it not objectively reasonable for the plaintiffs to have any fear, and, given the circumstances that they were facing, whatever the actual fear that they had in their hearts was.

So, you know, Chief Justice Burger says that the program was of known scope and that scope was not a vast one, that there are only about 60 agents, as you can do the math from his description, who were working on this nationwide.

And then the surveillance was lawful, which is a really very essential factor there. He said basically that it's simply what any good journalist could have gathered, that there are obviously good reasons why unlawful surveillance is held by subsequent cases to be, you know, sort of a pretty good foundational place for standing to be based on.

So you've got cases like Riggs and Jabara, Philadelphia Society of Friends --

THE COURT: Let me try and jump ahead then. In Laird the allegation or the chill was, the allegation was the chill is caused by what the government might someday do with the information that it gathered legally, right? Which sounds awfully hypothetical, I must admit.

MR. KADIDAL: Yeah. It's basically a speculative chain of causality leading to any sort of objective harm in the future. So that's the last element I think that's missing.

THE COURT: Whereas here you're saying the harm that you're experiencing is caused by the government's announcement that it's doing something that is, on your theory, illegal.

MR. KADIDAL: Right. Right. And by the things that we are obligated by our professional responsibilities to do in response to that.

THE COURT: And you referred to the fact that, cited by Chief Justice Burger, that the program in Laird was of known scope. I don't know who's got more catch-22s in this argument, but you're suggesting that -- are you suggesting that the very fact that this program is of unknown scope because of the assertions of privilege and so on intensifies the harm or distinguishes Laird in some way?

MR. KADIDAL: Well, you know, your Honor, you're a lawyer. I mean, you can imagine, how do you go about figuring out what you're supposed to do in response to an open-ended threat like this? We've got our -- we've submitted the affirmation of Stephen Gillers, who's probably the leading expert on this sort of thing in the United States, who says, look, you're obligated to take these measures given what we know that's out there factually. And I think that's basically the long and short of it. You know, they can say all they want about what they could conceivably produce in terms of limiting the facts about this program, but we're obligated to respond to what they have done, which is announce a threat that isn't limited in some way.

You know, the Army intelligence program was narrow, and again, I don't think that's one of the most major factors in the decision of the court in Laird. But I think, you know, obviously the fact that the harm wasn't objective and was highly speculative and hadn't happened yet, all those things that make it not a concrete harm, to use the Supreme Court's sort of later terminology, I think those are the most important things, along with the fact that there wasn't a chill. But this is a cumulative factor in terms of, you know, the scope in Laird was one of the factors that sort of was additive in terms of leading the court to conclude that it wouldn't be objectively reasonable for plaintiffs to be scared of this sort of program.

THE COURT: I think the last question that I have for you on the standing set of issues is, the DC Circuit's decisions in Halkin -- and maybe we can throw in the DC version of the Presbyterians, who's on which side -- are those the cases that you believe are also fairly distinguishable from this one or are you just telling me, well, that's the DC Circuit and I don't have to follow them and they're wrong for some reason, or both, probably?

MR. KADIDAL: Of course I would say the latter, but, you know, in terms of the -- to tie it back to the factual analysis that I was just kind of proposing in terms of Laird, this notion that you have to have objectively reasonable harm, or, sorry, objectively reasonable fear and then that the harm has to be somewhat concrete, that it has to be an objective harm, I think those are both elements that are missing from those cases.

I'd like to start with the United Presbyterian Church. You know, with all due respect to the people who brought that case, including the president of our organization, I think both of those elements are missing there. And we didn't address it in our brief so I'd like to kind of run through the facts, if you'll humor me. In that case there was an executive order issued by President Reagan in 1981 that basically set forward procedures for the division of labor between the FBI and other foreign intelligence agencies in carrying out surveillance, and that executive order is reproduced at the end of Justice Scalia's opinion for the DC Circuit. Now the EO makes no mention of the authority for that surveillance, but it seems on its face that most of the EO is basically addressing operational procedures for obtaining FISA warrants, you know, FISA having been passed a couple years before this EO issued. And nowhere in the executive order does it talk about warrantless wiretapping procedures. In fact, the order was issued in order to remedy some of the abuses that the church committee had uncovered a few years earlier. And again, Scalia addresses that as well in his third footnote in that opinion.

So if you look at what the plaintiffs alleged in that case, they claimed, one, that they stopped engaging in international travel because they thought it might make them targets under this executive order, as agents of foreign powers. Really, that's a complaint about FISA, but there's no allegation directed at FISA in the complaint there, as far as you can tell from the opinions. I haven't managed to pull the stuff from the archives yet, although we're trying.

And second, the plaintiffs there said, well, they might be targets now based on their past travel on the same grounds. But they made no substantive claims that any future government action was going to be illegal under this executive order. So I think that's deeply problematic for the reasons that I expressed when we were talking about Laird. And the district court opinion in the case actually makes it much clearer that the only real allegations of illegality that those plaintiffs were making were directed at actions that had taken place before this executive order that's at the center of all their claims, or all their specific causes of action actually took place.

So if I can read a little bit from it. I'll just cite it for the record. It's 557 F.Supp. 61. And this description of what the plaintiffs were charging comes at page 63. The judge says, Plaintiffs in this case have failed to allege any such redressable concrete injury attributable to the executive order. They allege fear and concern that they may be targeted for future -- sorry -- for intelligence-gathering activities but introduce no evidence to support their claim beyond allegations that some of the plaintiffs had been subject to possibly illegal surveillance for past activities in the past before the order was promulgated, nor do they make any allegations to support the assumption that any intelligence-gathering activities that may take place pursuant to the order in the future will be illegal.

THE COURT: Try and go slower --

MR. KADIDAL: I'm sorry.

THE COURT: -- because the court reporter's got to get all this and she's been working very hard here.

MR. KADIDAL: Okay. And then finally it ends, Plaintiff has conceded in oral argument that much of the activity authorized by the order is well within the strictures of the Constitution and the laws of the United States.

Now I think if you take a close look at the actual allegations in that case, you'll realize that Judge Scalia, when he writes his DC Circuit opinion, is basically way too generous in implying that there's any sort of colorably unlawful activity that's permitted by that order. In fact, he even says --

THE COURT: Judge Scalia was being very generous to these left wing plaintiffs.

MR. KADIDAL: That's right. He's a sympathizer.

But be that as it may, in fact he even says that the few allegations of illegal current surveillance are basically too generalized to support a complaint. So when you look at the examples he cites, it's things like, we sent letters and they never got there to people overseas or we suspect that our organization is subject to infiltration and disruption, without citing anything specific that leads them to attribute that to the government.

So that all touches on the notion that they didn't really allege very much in terms of illegality. Beyond that they also didn't allege that they were particularly vulnerable to warrantless surveillance either. These were basically political, religious, journalistic, academic groups. It doesn't mention lawyers; it doesn't talk about that. And, you know, the notion that we as lawyer plaintiffs, and particularly lawyer plaintiffs who do the kind of work that we do, basically, you know, suing the federal government in, you know, post-9/11 cases where there's, you know, some implication of links to terrorism and particularly where our clients seem to be detained specifically for the purpose of interrogation, there's obviously this fear that our communications with, and given that this program exists, are going to be essentially an extension of that interrogation process if they're listening. But --

THE COURT: So let me be as -- I realize I'm oversimplifying all that you've just said, but what I'm getting out of what you said is, to some extent, look, these were people who alleged we're generally the centers or people that we might grandiosely think are of great interest to the government, but who knows, really. Whereas in your case, you're saying that not necessarily you but your clients are people who have been directly alleged to be exactly the people that this program is designed to get at, and that's the heart of this distinction. Is that at the heart of the distinction?

MR. KADIDAL: The distinction of this particular case?

THE COURT: Yes.

MR. KADIDAL: Well, I think, first of all, the fact that we're making much more colorable allegations of illegality, right, that's one aspect.

THE COURT: That too, although I'll have to think about this because I've been accustomed to thinking about standing as being separate from some question of the merits, and I would have thought that anybody who's asserting standing and trying to get some relief is saying that there's some illegality on the other side --

MR. KADIDAL: Right. But then you have cases --

THE COURT: -- and were harmed by that, but maybe some of these cases are not quite that.

MR. KADIDAL: In Meese v. Keene, there's no underlying illegality, right, but there was harm. And that's the real inquiry.

And the vulnerability point is the other thing that really sharply distinguishes us from the plaintiffs in United Presbyterian Church in the DC Circuit cases.

THE COURT: Briefly, Halkin, is there --
MR. KADIDAL: Sure. Well, I mean, I think basically, you know, the story with Halkin is, by the time you get to Halkin II, which is the case that the government really is citing as one of its more important precedents to defeat our standing, you've essentially got no claim of illegality there either. You've got a situation where the only thing that is remaining in the case after the state secrets assertions is this notion that plaintiffs might be injured because their names might be put on watch lists and passed to NSA in the future. And the Court essentially says, look, there's no legal violation, you know, implicit in that. That's the short version.
THE COURT: Okay. All right. Mr. Coppolino, I'm going to give you the open-ended chance in a minute to respond to the things that Mr. Kadidal said in response to my questions. But I want to ask just a couple of more specific things first. The plaintiffs here are not, would you agree, just people off the street in the sense that we often think on the standing cases, that they're just citizens who read about this and they don't like it and they want to present an abstract argument to the Court? They're closer to this than that, aren't they?
MR. COPPOLINO: No. I'm not sure what you mean by citizens off the street, your Honor, but I would say --

THE COURT: Well, to me the classic notion of somebody who doesn't have standing is, you know, John Q. Public reads in the newspaper that the government is doing XYZ and says, by god, I don't like that and I went to law school and I think it's illegal, so I'm going to sue. And that person has no standing. You have to allege that you're somehow affected by this before you can get the courts to address your concern. In that sense, I mean, these people are not way out there when they make this argument, are they?
MR. COPPOLINO: Perhaps, but I'm not willing to concede that that addresses their standing adequately, your Honor, because the --
THE COURT: Fair enough.
MR. COPPOLINO: -- the ultimate issue is not whether they are more likely than another party to be subject to surveillance but whether in fact they can demonstrate factually or whether they have alleged sufficiently that there are reasonable grounds to believe they are subject to it and that a threat of harm is imminent. Those are the essential elements of standing. And so in our view it is not sufficient for CCR to say, we represent people who had been determined to have some association with Al Qaeda; therefore, we necessarily fall within this program such that we should feel fear and such that as a result of our fear, we take some conduct, we make changes in our conduct, which we think causes us injury.

THE COURT: Well, why shouldn't they feel fear based on what's in the public record?

MR. COPPOLINO: Because, your Honor, I think this is a fundamental difference I think we have with them. I do think that Laird and subsequent standing decisions look to the existence of some proscriptive requirement by the government. That is, you have standing if the government actually does something to you like surveils you or if there is a requirement in place which is, A, applicable to you, and, B, you can show as a factual matter that your chill is justified by an imminent threat of harm.

THE COURT: Well, let me put a hypothetical. Suppose the police commissioner here in New York says, you know, due to increasing violence at sporting events or maybe even due to terrorist threats, we're going to at random strip search people who come to ball games. And we're not going to say how we're going to target the people other than it's random. There won't be any profiling, there won't be any reasonable suspicion, we're just going to pick people at random. And we think that will discourage people from bringing beer bottles and guns and god knows what into the arenas. Now are you saying that a plaintiff -- well, let me start with a plaintiff who actually goes to Yankee Stadium and they say, excuse me, ma'am, we'd like to strip search you, and she says, no, thank you, I'm going to leave, and they let her leave. Standing? On the ground that I had a ticket, I made the choice not to go into the game rather than be strip searched, but she was never searched by anybody. Standing to raise whatever Fourth Amendment claim might be raised against such a program?

MR. COPPOLINO: I would say yes, because the policy that was announced was specifically applied to her as she went to the ball game. We have a requirement, here it is, we're going to strip search Yankee fans as they go to the game, it was applied to her, she had an adverse injury because they said, you can't go to the game.

THE COURT: Okay.

MR. COPPOLINO: Let's assume that's an injury, which I don't know if it is.

THE COURT: What if the plaintiff says, I had a ticket, in fact, I have season tickets, I go to every game, and I think, whatever they're doing, the odds are they're going to get to me sooner or later. I'm turning in my season tickets. I'm not going to the games because of this. No standing?

MR. COPPOLINO: I don't know. But let me tell you what I think about that. Let me tell you what I think about that.

THE COURT: Fair enough. That's not your case. It's fair for you to not answer directly. But why, what would be the argument that she doesn't have standing?

MR. COPPOLINO: I think the difference is, from your hypothetical, I would discern that the New York Police or whoever has presented this policy has announced a requirement: This is one of the things we're going to do. It's not that different from the McWade case that was just decided where they had a requirement of random backpack searches on the subway.

THE COURT: Excuse me. But when you say requirement, I think what I -- what I think is true of the subway case and what I'm trying to suggest in the hypothetical, it's not that we search everybody who comes in, it's that there is a random search process that people might get subject to this and then some people make a decision, I don't want to be in the lottery, I'm going to take unilateral action to absent myself from that lottery. And is there standing there?

MR. COPPOLINO: I understand that. I just don't think that the policy in place, that imposes a proscription, that the fact that it doesn't necessarily apply to every single fan doesn't make it less proscriptive. It is an enforcement matter as to whether it is applied to every fan. But my point to you is that it is materially different from surveillance. Surveillance, foreign intelligence surveillance is something the government might do, it may not necessarily do. It is done in part to find out where the threat is. And what they're saying is that the existence of a surveillance program with respect to Al Qaeda imposes such an obligation on us or a burden on us that we have to react to it. I think that puts them into the category of people speculating that they're likely subject to the program.

Now in the case of the strip search policy, they are subject to the program. The target of the program is known. People going to Yankee Stadium, you are a potential target. In the case of surveillance, who is and is not a target, beyond this level of generality that we're seeking to surveil or what Al Qaeda is up to, is not as clear --

THE COURT: No, no, no. I mean, I realize that one of the things that makes this case difficult -- and I'm sure this is at the heart of your point in a lot of ways -- is that we don't know exactly what the program is. What the plaintiff is alleging, though, based on, as I understand it, what they're alleging, based on public statements, is that the government is authorized to seize the conversations of people believed to be associates of Al Qaeda with people in the United States. Right? And so we're not just -- when we say surveillance, we are talking about a Fourth Amendment event of some sort, right, as the seizure of a conversation, correct?

MR. COPPOLINO: I understand the point, your Honor, but I happen to think that the reasoning of Judge Scalia in United Presbyterian and also in Halkin in the DC Circuit distinguishes this case from your hypothetical and from their claims of injury and that is, if you think you have a greater likelihood of being subject to surveillance because for some reason you think you might fall within the scope of the program, as Mr. Kadidal pointed out it could be because you traveled a lot, it could be because you're a political activist, those may be less specific reasons than they have advanced here, but nonetheless, they're reasons which the plaintiff have said we're more likely to be subject to surveillance. I think the Court correctly concluded that that is not sufficient to demonstrate an actual imminent harm because whether you are in fact going to be subject to surveillance is a matter of conjecture, unlike your hypothetical, where, if you happen to get picked, you are going to be subject to the strip search. And so -- and I think being at greater risk in general, as the court in United Presbyterian pointed out, falls too far short of the genuine threat of imminent harm that would support Article III standing, which is, admittedly, I think, a reasonably tough standard to meet, because there has to be an actual case or controversy.

And so I think what they're actually arguing is very much akin to what the plaintiff said in Laird, because they're saying, we feel we are more likely to be subject to this program, we're not sure if we are, we might be, as Mr. Kadidal said a moment ago, we might be subject to it but we're not sure. And my point to you in response is that, unlike the situation in cases that involve policy, such as statutory requirements, banning leafleting on the sidewalk and things of that nature, which are generally applicable to the communitywide, and I would put the hypothetical you just gave in there, a surveillance program doesn't necessarily apply to anyone in particular, and an allegation that it might apply to you because you're more likely to fall into it is too speculative, too conjectural, to establish standing.

THE COURT: And can you respond to this argument that the announcement of this program, particularly coupled with the, I'll stipulate certainly for purposes of this question, legitimate refusal to further detail what the program is puts them in a position where they necessarily must assume that they're subject to it for purpose of taking professional actions that are costly and that impose burdens on them? Is that -- I think I understood Mr. Kadidal to be making that as an argument that creates a harm that isn't present just with some generalized, you know, we know, as in Laird, what the government says it's doing, we even know how many agents they've got doing it and we can make some estimates of what's really likely and what's not really likely. Here, and again, I'm prepared to stipulate, legitimately, the government says, we won't tell you any more about this. Don't they then have to act as if they're subject to the program?

MR. COPPOLINO: No, I don't agree that they have to as a matter of law, in other words, as a matter of responding as if this were an actual requirement that is imposed on them.

Their reaction is akin to the reaction of the plaintiffs in Laird, which said, we have a present inhibiting effect by the existence of the intelligence surveillance program. This program may be more specific in its contours because it says it is focused on the Al Qaeda threat. But nonetheless, I would submit that their reaction to it is a self-imposed inhibiting effect that is based on speculation as to what the program actually does.

I would add, to go back to your original question, though, that to the extent this implicates factual questions as to how the program actually operates, then the standing problem becomes a factual problem, not a problem of allegation, and that is why we have quickly gone from one to the other. I think there's a serious Laird problem. On the other hand, if there is not, I think there is a fact problem precisely because, if we could demonstrate to you that in fact these concerns are not well founded, conversely, your Honor, if we could demonstrate to you that they were well founded because this is how in fact we do this program, either would run into state secrets.

THE COURT: All right. I guess that just leaves me with one question, and maybe the answer is that's just how it is and the law works out that way sometimes. But this does create a situation, does it not, where, by definition, the only people who could ever have standing to contest this program or to raise the legal issues that these plaintiffs want to raise by definition can't ever know that they have such standing?

MR. COPPOLINO: Can't ever know? It's certainly intended that the people that we surveil do not know that they're being surveilled.

THE COURT: I should hope so.

MR. COPPOLINO: However, it's not to say that there may not be an instance where, if it ultimately comes to light, as an official acknowledgment in a criminal case, for example, where someone was subject to the Terrorist Surveillance Program, there could be an opportunity to contest that program, but I can see --

THE COURT: By way of suppression motion, in effect?

MR. COPPOLINO: Yes. But I can see there would have to be an acknowledgment of the program. The opposite, though, concern, if that is of concern to you, that only someone as to whom the program has acknowledged can raise standing, the opposite concern I think is equally true, that if we have someone as to whom we cannot confirm or deny surveillance, and that, by the way, is valid evidence to go to whether or not their fears are well founded, if we cannot then demonstrate to the Court how the program operates in order to demonstrate that their fears are not well founded, then the issue of standing can't be adjudicated.

And furthermore, if you were to just say, as a matter of allegation, well, we don't know if we've been surveilled, in fact, the government can't actually tell us and we accept that, we're going to have to -- but, however, we're concerned about this program, we think we might be subject to it and now we want to contest this lawfulness as a part of, in an article -- in a federal court, where we need a clear case in controversy requirement, I would submit that isn't enough, that you have to be able to allege some sort of concrete imminent threat of actual injury beyond the mere existence of the program, your fear of it and the subsequent inhibiting steps that you take as a result of that.

THE COURT: Okay.

MR. COPPOLINO: By the way, your Honor, they cited a raft of cases in their brief which they think meaningfully distinguish Laird. But if you look through each of those cases -- and we've discussed this in our brief so I won't repeat them, as you admonished. But Meese v. Keene and numerous others are cases that have two essential fact patterns: Either, one, there was some direct action taken against the plaintiff; they were actually surveilled. The California Presbyterians, they were actually surveilled. The FBI or whoever it was went to their church, and that was known, the surveillance was confirmed, and as a result, the Court said, their claim of injury, a decrease in attendance of church and so on is well founded.

Mr. -- in the Meese v. Keene, this was an individual who was subjected to an actual regulatory requirement that if he showed certain films from Canada, he was going to be labeled as showing something that's political propaganda, he had to file a registration statement with the federal government indicating that he was lobbying on behalf of a foreign government, he had to give a copy of the film to the attorney general, and he had to tell people he showed it to that the government says it's political propaganda. Actual proscriptive regulatory requirements imposed on him, far different from what we have in this case.

Mr. Jabara, the case in Detroit that he mentioned, he was surveilled for eight years and it was acknowledged. There was no unconfirmed surveillance there. He had standing. He had direct standing.

And I could go through the list of these, but you get my point.

THE COURT: You're saying that applies across the board to the cases they rely on, essentially.

MR. COPPOLINO: Yes, it does.

THE COURT: One final thing about what the facts either are or aren't. I take it I can assume for purposes of this litigation and these motions that everything that the president and the attorney general have said, and I'll add General Hayden to that as well, are true, the things they've said in the public record? That is, there may be more details or a lot of things that have not been addressed by those statements, but there is no contention here that the government is precluded by a state secret privilege from presenting evidence that would show me that actually these things aren't the way they've been represented?

MR. COPPOLINO: No, I think you can assume everything that the government has said in the public record, the president, General Hayden, the attorney general, is true.

THE COURT: Is true?

MR. COPPOLINO: It just may not be fully complete, as they have all indicated.

THE COURT: Right. Because there are all sorts of operational details which you argue are relevant and they argue aren't, whatever, ranging from very detailed matters to fairly significant generalities that are not in the public record.

MR. COPPOLINO: Right. And as long as we're clear that I'm agreeing that what they said is true, not some interpretation of what they said is true.

THE COURT: Of course. The only alleged admissions here are the things that have been said, not what the press or somebody else attempts to make of them.

Okay. Is there anything else that you wanted to raise in direct response? Because I think it's only fair. I had spent a lot of time with Mr. Kadidal and he said a lot of things. If there's anything that you think is critical to be responded to, I'm happy to hear it, even if it's not a direct response to anything I asked you.

MR. COPPOLINO: Nothing, your Honor. The only other point I would make about this, whether they're more chilled under the TSP than under other programs, because we lose sight of the fact -- basically, they think the universe of other programs is just FISA and Title III in the United States and in fact, under EO 12333, that surveillance could occur overseas. And so, you know, it is not our central standing point by any means. But the notion that the Terrorist Surveillance Program creates a greater inhibition on them where, in representing their clients who reside overseas, who may be Al Qaeda suspects, they could be surveilled by the United States overseas. And so we think that their allegation of an additional chill under the TSP is not well founded.

THE COURT: Well, let me just try and nail down the factual/legal issue there. If somebody, Mr. Arar, makes a telephone call from Canada to Mr. Kadidal's office in New York -- New York is where your offices are? All right. He makes that telephone call. Would I be mistaken in any way in assuming that by statute, by, you know, putting aside your claims of inherent power or whatever, but could that be intercepted legally, under FISA, under Title III? Under FISA it could be if it met the standards and there was a warrant or it was in the window before the warrant or whatever. But the fact that Mr. Arar is abroad doesn't change the fact that that interception of that phone call to New York, so far as FISA is concerned, has to be intercepted only under FISA. Am I wrong about that?

MR. COPPOLINO: Your Honor, I think it depends on the method of surveillance and the authority under which it's undertaken, and I'm not prepared to say that it would have to be -- if it's intercepted overseas, that it would have to necessarily be under FISA or Title III, and it does go to a particular source and method that was utilized.

THE COURT: And again, I'm not going to ask you about what is possible or isn't possible. But assuming something very simple, I guess, I mean, something actually, I'm sure, would be highly classified. If any of this were ever done, it would be a very simple technology. Somebody goes to Canada and puts a device on the guy's telephone in Canada. If the call is to the United States but the interception somehow takes place outside the United States, by whatever science fiction or other means we want to imagine it takes place, the fact that the call is coming to the United States is not what puts it under FISA, in your view, it has to be --

MR. COPPOLINO: I believe that's correct, under the definition of what is subject to the FISA, your Honor, but I would guess -- or I'd prefer to review that further to be absolutely certain, but my understanding is the methods that could be utilized to surveil overseas would not necessarily be subject to FISA.

THE COURT: So it's not just a function of where the call is coming to, it's also a function of how the interception is made.

MR. COPPOLINO: That's correct.

THE COURT: Okay. Mr. Kadidal, is that your area or is that Mr. Avery's?

MR. KADIDAL: It's probably my area. I mean, our response to all of these are essentially causation arguments.

THE COURT: I understand that. But I'm just trying to get -- I want to know where I stand. In terms of FISA coverage, is it your understanding or is this something I can find out more about, or find out more about it, that if the interception takes place by some technology that is not operating on United States soil that FISA would not apply, that FISA is a function not only of who's a party to the call but also where the interception takes place or how the interception takes place?

MR. KADIDAL: Right. This is all in FISA 1801(f), essentially the definition of electronic surveillance, so it also implicates --

THE COURT: So I can go and read it and figure it out and everybody here is flying a little higher on such details.

MR. KADIDAL: It also indicates who the targeted party is. You know --
THE COURT: That's what my understanding is, but I may be wrong. I think both parties, in fairness, have briefed a lot of this on the assumption that whatever it is, it violates FISA, because more or less that's what's been said. But I don't know if that's actually right.
MR. KADIDAL: Well, I believe we cite to statements that essentially the program is something that -- Hayden and Gonzales talk about this notion of parallel authorities, that the surveillance that we're doing under the program is surveillance we could do under FISA.
THE COURT: Okay. All right. Let me turn next to the merits of the statutory/Article II issue here.
Mr. Coppolino, is it common ground -- I understand what you just said about the executive order and some other possible possibilities for interception that maybe are things that the plaintiffs should have been concerned about even before the TSP, but is it not common ground in this case that whatever the government is doing under the TSP program is in fact expressly prohibited by FISA?
MR. COPPOLINO: It actually is not, your Honor. The government's position in describing how the TSP works has made an assumption for public debate that the methods used under the TSP are akin to the methods that are used under the FISA. But

that in itself is a classified fact as to how the methods of the TSP are carried out and whether in fact they meet the definition of electronic surveillance under the FISA. We don't agree that the government has specifically conceded that point because it would concede particularly sources and methods. But the assumption is, for purposes of this case, that FISA may cover these types of communications or at least some of them, and therefore, we defend the lawfulness on that assumption.

THE COURT: Okay. I think I hear this but let me try and restate it to make sure. You're saying I should assume for purposes of this case that whatever it is that the government is doing would violate FISA, even though you can't confirm or deny that that is in fact so?

MR. COPPOLINO: No. I'm saying, precisely because I can't confirm or deny the specific methods utilized under the TSP, you shouldn't make any assumptions about that. And that's one of the difficulties adjudicating the merits of this lawsuit. Because the very fact of how these intercepts work and whether or not, as a factual matter, they are consistent with the intercepts under FISA is something that we couldn't acknowledge, and that's the difficulty in litigating a lawsuit like this because the assumption throughout is, this is all subject to FISA. And there has been certainly a lot of public discussion and debate as if that were so. But we've not confirmed the specific means by which we have intercepted conversations under the Terrorist Surveillance Program.

THE COURT: I understand that. Is that a position that's different from what was said in your brief? Because I think this is the first time that I have understood that the government is taking the position that it is a contested issue whether this surveillance violates FISA, a contested issue which you then say we can't adjudicate because of the state secrets privilege. But that was not one of the issues that I thought was contested.

MR. COPPOLINO: I think there is the distinction. The president has indicated and we have I think indicated on the public record that this program does not proceed under the FISA. That is to say that the Terrorist Surveillance Program's intercepts are not ones which we go and obtain an order from the FISA court in order to carry out. And we have defended the program as that that would not be consistent. That would indeed impede the president's Article II authority to protect the nation from attack if we had to do that.

But the question you originally raised is a narrower and specific question, as a matter of a specific source and method, is it precisely the source and method that is covered by FISA. And the answer is, that has not been a matter that the government has actually confirmed.

THE COURT: So you're telling me that everything the people have been saying in public, which wouldn't surprise me, actually, that everything the people have been saying in public, in the press and whatever, the entire premise of this debate could be completely off the point because there might be no violation of FISA here whatsoever and the government does not concede for purposes of this litigation and has never said on the public record that it is conducting any surveillance whatsoever that would be prohibited by FISA?

MR. COPPOLINO: The public debate has made assumptions and that's how it has proceeded. And all I can do further, your Honor, is refer you to our classified submissions to understand precisely the sources and methods that are at issue.

THE COURT: I'm happy to do that and to hear that. I just want to make sure I understand what is in the public submissions because -- once again, is there anything you can point me to in the briefing that has said this? Because I missed it. I came in here and maybe -- you know, this happens. You read stuff in the newspapers and no matter how much you try not to be influenced by it, you may make certain assumptions. I was operating under the assumption that there was not a contest as to whether the very meaning and purpose of this program was that the government felt it necessary, the president felt it necessary, to engage in certain things that would otherwise be prohibited by FISA. And I don't remember anything in the briefing. You would think that would be like point 1 of what the plaintiffs need to prove that is a state secret is they start by saying this program violates FISA and nobody's ever said that and we've never confirmed that and it's top secret exactly how we're doing it, and exactly how we're doing it is critical to whether it violates FISA, therefore, state secrets, therefore, end of story. And I don't remember you saying that.

MR. COPPOLINO: Understand, your Honor, that our motion to dismiss or for summary judgment is built on the fact that there are state secrets that we cannot confirm that run the range, whenever there's been surveillance necessary to decide these claims, and that has been built on -- in response to this lawsuit, we have come here and said, look, if you want to actually try to litigate these claims, here are the kinds of state secrets you would need to get into, and we haven't described them publicly, we've described them in camera, and this is among them.

THE COURT: But again, Mr. Coppolino, I would separate the state secret issue in general into two different things. One, I have to decide, what are the legal issues, and it's only once the legal framework is kind of understood that we then reach the question of, well, what facts do we need under that framework and are they secret. And one thing that I had not assumed, frankly, was in contest was the allegation that whatever the source of legal authority for doing this that the government asserted, it was not contested that this whatever it is violates FISA and that the government's position on the merits is that FISA is pro tanto repealed by the authorizations for force resolution or FISA is pro tanto unconstitutional because of the president's inherent power to do certain things to protect the country. And as to each of those propositions, I understand the government has certain arguments that fact X, Y or Z about the program is highly relevant to answering those questions and is a secret. But I had not understood it to be the case, and I'm asking you if there's any place in the briefing where it said, that the government actually contests the plaintiffs' allegation that whatever it's doing under TSP violates FISA, assuming that FISA is not repealed and assuming that FISA is constitutional.

MR. COPPOLINO: I'd have to search my brief and find the page. And it's also possible it's in the other brief.

THE COURT: Okay.

MR. COPPOLINO: I know we made the point. I don't have a memory right now whether it's in this public brief or the other.

THE COURT: Okay. I'll look for it. And I don't know whether it's any question of waiver or anything else anyway, but I'm just curious because it's not something I picked up, and I'm usually pretty good at picking up what's in the briefs.

MR. COPPOLINO: Just a point of what type of method it is, not to confirm that there is a particular method.

THE COURT: Understood. And I'll state it again, and this isn't going to keep anybody who's listening from getting it wrong, but I understand, I understand perfectly well that you are not saying here that it is a fact that what we do does not violate FISA any more than you are saying it is a fact that what we do does violate FISA. You are saying we can't confirm or deny that because it's a secret that would reveal intelligence methods. The issue that I'm asking is just, it is a live issue in the case because the government, according to you, has never conceded in public that what it is doing would violate FISA and therefore that's an open issue?

MR. COPPOLINO: That's correct.

THE COURT: Okay. I've got it right, as far as --

MR. COPPOLINO: Yes.

THE COURT: Okay. Good. All right. That certainly renders a lot of what I thought were the issues in the case perhaps more moot. But let me go through some of them anyway.

If we were to assume that whatever the government is doing does violate the terms of FISA, there's an amicus brief from the Washington Legal Foundation that says straightforwardly then, FISA is flat out unconstitutional to the extent that it limits the president's authority to engage in surveillance that the president believes is necessary to ward off threats of military force against the United States, essentially.

I'm not asking if you agree with everything they say in the brief. Obviously you have your own brief. But that is the position that the government takes here, is it not?
MR. COPPOLINO: Correct. We've made very clear that to the extent FISA is construed as applying to and therefore barring the Terrorist Surveillance Program, that we do think that raises an extremely serious constitutional question because the president, in our judgment, has retained inherent authority under Article II of the Constitution to undertake foreign intelligence surveillance. We're not making this argument with respect to all foreign intelligence surveillance of any kind but specifically with respect to the TSP in this case, because that's what's at issue in this case, that if you apply FISA, to bar the TSP, you are intruding on the president's Article II powers that he has to undertake foreign intelligence surveillance.
THE COURT: Well, let me push you on this because it's a little hard for me to sort out what is fact-specific and what is not. Without characterizing the TSP in any way, is there any way that you can narrow the claim of what is it that the president inherently can do without saying it's any foreign intelligence surveillance that the president feels like doing? In other words, I don't think that it requires you to disclose anything about this program to be more specific about what the legal standard is that you're proposing, all right?

MR. COPPOLINO: Right. But I am not attempting to draw the line as to what the president can and cannot do. What I am saying is that he has authority. The specific application of that authority is going to depend on the facts and circumstances of the particular case, at the very least. It may well be that the Court may find -- the courts may find, as they did preFISA, that the president has very broad authority to authorize foreign intelligence surveillance, so long as it is directed at the agents of a foreign power. That's really the key standard. Foreign intelligence purpose, directed at an agent of a foreign power. And beyond that, whether it crosses a particular constitutional line as between president's authority and Congress' authority to regulate foreign intelligence is going to depend on the particular case. If we saw in, for example --

THE COURT: Yes, it depends on the particular case, but Youngstown Steel or at least the Jackson opinion, to which we all genuflect in Youngstown Steel, says, I think -- maybe you can correct me about this if I'm wrong -- says that it's not as simple as the president either has or doesn't have inherent authority. Where Congress has some regulatory say in the matter, if Congress hasn't gotten into the business, then the president may have quite a lot of authority to do various things. But once Congress does exercise its responsibility in the matter, exercises its power, then that changes the deal.

So here's what I take the plaintiffs' position to be in this case: I take the plaintiffs to be saying that if FISA flatly prohibits the president from doing whatever it is he's doing, then there is no inherent authority, period, anymore. Maybe there was before FISA because somebody's got to deal with this issue and the president has a general power in foreign relations and the president does what the president thinks best. But once Congress comes into play, assuming that Congress has a heading of power here to deal with it and Congress exercises that power, then the president's residual power more or less disappears, at least if Congress has totally occupied the area, which they're saying it has and which it certainly looks like when you read FISA. That they're saying, these things shall not be done except under these terms.

Now if they were right about that, and I understand you say they're not, then the only national security, the only fact that needs to be decided, which I didn't realize was contested, is, does this program violate FISA, right, because if it does, the game's over, on that legal theory.

MR. COPPOLINO: But your Honor, what box you fall into under Justice Jackson's opinion I don't think can be so easily determined. I mean, you can obviously determine if Congress hasn't acted, something, if Congress has acted in the field, then the toss-up is, is it box 2 or box 3, shared power or where the president's acting alone. And you have to look at in particular whether Congress itself has legislated, as you just pointed out, within the limits of its power and whether it has impermissibly intruded on the president's Article II powers. Could well be that in fact the president had the Article II power to do all foreign intelligence surveillance. We're not taking that on in this case because we don't quite need to. We need to just demonstrate that the Terrorist Surveillance Program falls within the president's Article II power, as we are confident that it does. But --

THE COURT: But which you can't explain because we can't know what that is.

MR. COPPOLINO: Well, yes. I mean, that is the dilemma of the case. Because if you accept the notion that there is a line between what Congress can do under FISA and what the president can do and that actually might not in fact be the case, it might be all the president's authority, as we think a fine argument can be made, as all of the courts that looked at this had concluded --

THE COURT: No, no, no, they did not. They're doing something very different, it seems to me. Forgive me for interrupting, but it does seem to me that all the courts that have addressed this in the past, except for In Re Sealed Case, which back-in-the-hands it, were addressing a situation where Congress had not acted, and that's a very different --

MR. COPPOLINO: I didn't finish. I was about to say that the president had some inherent authority to do what was at issue in that case. Now comes FISA and FISA's enacted by Congress. Our view is that FISA doesn't magically eliminate whatever inherent authority the president had because that authority derives from the Constitution itself, from his Article II powers as commander in chief and as head of state as involved in the -- as our leader in foreign relations.

Now if that proposition of law is true, and we're quite confident that it is, then you have a collision between Congress attempting to take the field and the president saying, wait, I have powers here that you purported to try to take away from me under the FISA which I don't think you can do, at least in this particular application, and we'll worry about other applications later because certainly there are -- the executive branch works cooperatively with the FISA court and therefore with the instrument Congress has passed in numerous instances.

And so in that respect there has been an accommodation where possible. This was an instance where the president felt that to follow the prescriptions of FISA would impede his ability to protect the nation from attack.

Now therefore, that does raise a serious constitutional question. By the way, the AUMF argument which we advanced, which we're quite confident of, nevertheless is an attempt to avoid this constitutional issue, as the Court is advised to do.

THE COURT: Well, I think I'll just in summary say I'm not that impressed by that one. Let's talk about the constitutional one because I think it is a very serious issue.
MR. COPPOLINO: Sure.
THE COURT: Is there any case that you're aware of where the Supreme Court or any court has held that an act of Congress that purports to regulate some foreign affairs matter is unconstitutional because it infringes the inherent war powers or commander in chief powers of the president?
MR. COPPOLINO: It's not jumping to mind, your Honor. I don't want to say there's one that isn't out there.
THE COURT: You haven't cited me one that I know of?
MR. COPPOLINO: I don't believe we have.
THE COURT: There are cases, of course, like the appointments powers cases where acts of Congress have been found unconstitutional for infringing on presidential power. But there aren't many, are there? I mean, this is a pretty uncharted ground that you're asking me to get on, or you're asking me to stay off it. But basically, in saying that FISA can be unconstitutional for this reason, if we got to the merits of this, you would be asking this Court and ultimately more authoritative courts than this one to rule that on the basis of implicit understandings, conundrums and emanations and unspecific things in the Constitution, that an act of Congress signed by the President of the United States into law enacted

after full debate by the political branches of the government is nevertheless unconstitutional.

MR. COPPOLINO: Your Honor, I think you have to concede that if there were any area where that would be so, it would be an area which has purported to take away from the president the power to detect the activities and locations of an enemy attempting to attack the United States. Because in this context, unlike any other case that has involved a potential showdown between the Congress' powers and the president's powers, you have clear Article II power to protect the nation from attack. That's been recognized by the Supreme Court.

THE COURT: And where is that --

MR. COPPOLINO: It was in the case of --

THE COURT: No, where is it textually in the Constitution?

MR. COPPOLINO: Well, the president's Article II powers as the commander in chief of the United States, we submit, includes inherently the power to surveil the enemy to know when it is coming. It's his most basic duty to protect the nation from attack. I don't think that's really a disputed proposition.

THE COURT: I guess what worries me about that, you know, it may be terribly unwise for Congress to inhibit the president's freedom of action in military matters, but after all, what we are talking about here is domestic activity. We are talking about, that is, Congress' power to regulate, for want of a better word, the civil liberties and rights of Americans on American soil. We're talking about a textual Congressional power to regulate the government and conduct of the military forces that are subject to the president, and we are operating in a constitutional order in which, generally speaking, Congress, or at least two thirds of it, usually gets to override the president or, in which, when the president signs something into law, it becomes law, and courts do not lightly strike them down. I understand the plaintiffs want me to strike down. Everybody's got their judicial activism that they want me to do here. But this is serious stuff that you're suggesting when you say that because the president is the commander in chief and because he has an obligation to operate as such in a way that will protect the United States, that that gives him the power to override what Congress says can be done on American soil to Americans. Even Julius Caesar didn't get to bring his Armies back into Rome, right? He did. But that was the boundary line between what gets done in this country and what gets done abroad.

MR. COPPOLINO: Your Honor, your statement is making some assumptions as to fact and law. First is the assumption that even under box 3 in Youngstown, I think it was clear that the Congress could indeed infringe on a constitutional power of the president.

THE COURT: Sure.

MR. COPPOLINO: And that is not -- even if it's perceived to be at the low ebb, that is not a proposition that is really in dispute. Congress can intrude on president's Article II powers.

Secondly, while I agree that in some respects Congress has some authority in the area of national security and foreign affairs, it is primarily in the power of declaring war and in supporting our armed forces. The president's power is much broader in that area, as courts have consistently recognized, and in particular courts have recognized that the president not only has, as his most basic duty, to be the person on the line in our government protecting the nation from foreign attack as the commander in chief, but that he also in that capacity has the authority to utilize intelligence services and has traditionally utilized intelligence services throughout the course of our history.

Now we could elaborate on the latter point at much greater length if at this stage we had been briefing the merits. But the proposition I don't think is really seriously in dispute that the president's Article II powers as commander in chief necessarily include and indeed must include the power to detect where that enemy is coming from. That's his duty. His duty is to protect the nation from attack. And if he doesn't have the tools available to do that or if he believes that a Congressional enactment has impeded his ability to do that as swiftly as possible, then he is himself not living up to his constitutional --

THE COURT: Doesn't Congress always have the power to give the president tools or not give the president tools that he can raise armies or not? They can provide for the funding of any of these high-tech or low-tech surveillance activities or not. They can provide tools or withhold tools. And it may be terrible for them to withhold tools in a particular situation; it may be awful political judgment in a particular case. But when you say the president must have the tools, doesn't that prove too much?

MR. COPPOLINO: I think not, your Honor, because if you take as a proposition that the authority granted to the president under the Constitution is his authority to exercise, then if Congress seeks to take away a tool that the president needs to carry out his constitutional duties, it would be an impermissible encroachment on the president's powers.

THE COURT: So he can build a B-1 bomber if he wants to, whether Congress pays for it or not, if he thinks it's necessary to have it in order to fight a particular war?

MR. COPPOLINO: Your Honor, I'm not going to concede the hypothetical because you're talking about something that falls squarely within the power to raise the armies and to provide their implements. We're talking about, that also implicates Congressional appropriations authority as well. But here, there is no Congressional authority, express Congressional authority beyond the authority to declare war and raise and support armies to carry out foreign intelligence surveillance of the enemy. I'm not saying they may not have any authority in this area, but it's really a question that has never been resolved.

You mentioned, is there a court case. The Keith case specifically reserved the question. Obviously the Supreme Court in Keith was troubled by the notion that the law necessarily took away from the president the power to engage in foreign intelligence surveillance.

The Zweibon case, which is a DC Circuit case, in a lot of that analysis suggested that, well, maybe the president didn't perhaps have full plenary authority with respect to foreign intelligence but it limited its holding in that case because the particular organization was a domestic organization.

And I think the reason for this caution by the Supreme Court in Keith and the DC circuit in Zweibon is that this is an area that is so much inherently close to the actual day-to-day duties of the commander in chief, the armed forces and the intelligence services that support them to detect where that enemy is coming from. It is as close to the modern-day battlefield as you can get. Where is Al Qaeda today, what are they planning to do, where are they planning to hit us? And the proposition the plaintiffs advance is that for the president to do all that he feels necessary and appropriate to find that out, he has to stop and follow a Congressional prescription and go to a Court and say, may I please go find out what Al Qaeda is doing today? We think that raises a serious constitutional problem.

THE COURT: But the argument that you're making essentially would apply to any provision of the penal code, that if the president feels it's necessary to break into a psychiatrist's office to find out what Al Qaeda is up to, he can do that. If an American citizen is to be kidnapped or physically assaulted in order to get information, he can do that by the same argument, can he not?

MR. COPPOLINO: I disagree, your Honor, that it necessarily applies there, because whenever you get into another area, and this is -- they cite Hamdan, and they cite some other cases. You have to analyze, first of all, does Congress play a role in establishing a particular regulation that is at issue.

And so the implications of our argument is not that the president can do whatever he wants in every circumstance, and nor have we argued that. We didn't, for example, argue in Hamdan that the president had inherent constitutional authority to establish the terms of the military commissions in that case. It was a straight-up question of whether the executive's actions were consistent with statutory authority, and the Supreme Court decided the matter.

So I don't concede that the implications of our argument is that in any other conceivable area where national security imperative applies, the president can act. It is contextual. And that I think is --

THE COURT: What is the special context of electronic surveillance that's different from human intelligence that could be obtained by interrogation? Why is that somehow within the president's special zone while the other might be something that Congress has greater authority to regulate?

MR. COPPOLINO: Well, I didn't understand your question to draw a distinction between the signals intelligence and humans intelligence.

THE COURT: Well, I was thinking about, if somebody in Mr. Kadidal's office had spoken to somebody from Al Qaeda and was thus believed to be in possession of information that would be useful in warding off an attack, isn't it an intelligence function of the sort that you're describing --

MR. COPPOLINO: I see. I understand.

THE COURT: -- to get that person and pull them off the streets and put them somewhere where they're compelled to talk about it?

MR. COPPOLINO: I understand. Yes, I would say it is possible, depending on the scenario that's at stake. Suppose, for example, the president obtained intelligence that a nuclear bomb was planted in Georgetown, you know, right there in Washington, and the only way he was going to find out whether that was going to happen would be to go grab the person and interrogate him. Would that be within his constitutional authority? I would say it would. Now --

THE COURT: Well, let me push that, because I understand that there's a whole different argument that philosophers and lawyers have had about the human rights implications of that. But what I guess I'm asking is, isn't this a different question than the question of -- suppose we have that human rights argument, not here in this courtroom, not asking some judge to say it's unconstitutional for the government to do that ever, even in those extreme circumstances, but we have that debate as a political matter in the United States of America, we ask that question of the voters and their representatives, do we agree with the sort of Dershowitz position about torture or the Jeremy Waldron or somebody else's position about torture and we have the debate and Congress decides either by a two thirds majority or by simple majority that is then concurred in by the president of the United States at that time that no, we do not allow that kind of thing in the United States, you're saying not only that this individual has no human right to trump the government, you're saying that the president has the inherent authority to override that decision by the political branches of the government.

MR. COPPOLINO: But, your Honor, I am not saying that that is a process that is not to be respected and that does not in the main establish where the lines are drawn. It is conceivable, it is certainly possible, and we think this is one instance where the specific line is drawn; nonetheless, in a particular application, will encroach on the president's inherent residual authority.

THE COURT: But the problem is, there's then this catch-22 that comes into play which is that, as a practical matter, the state secrets privilege, at least as you would apply it here, means that de facto, however the president decides to exercise that authority, since it will, of course, I have to assume, only be done in cases that are believed by the president to be of critical importance and highly confidential, the president de facto will always have the power to do it because there's nobody who can even question it in a courtroom.

MR. COPPOLINO: I think that overstates the case a little, but let me tell you why.

THE COURT: Sure.

MR. COPPOLINO: First of all, to go back to your prior point, we constantly have disputes in our government between our political branches as to who has what power and where the line is drawn. But if you take the proposition you advanced that any time Congress enacts legislation that that simply is the end, then there would never be the possibility that Congress has sought to intrude on the president's powers. We know that that is certainly possible and the question is going to be, when. And indeed, when Congress enacted FISA --

THE COURT: Well, but I would submit that maybe the answer is when the constitutional text gives the president a very clear-cut power. There have been such instances, of course, when the president has an appointments power. I take it that, and plaintiffs concede, if Congress passed a law that said from now on, General X is in charge of the Army and he can do whatever he wants in pursuing, if he follows the words of the president, that would violate a specific commander in chief power. But it's a little harder for me to think that these things come out of some generalized sense that, well, national intelligence is something that's the president's --

MR. COPPOLINO: Well, I just think that's a little -- you're characterizing our argument a little bit broadly, your Honor, that -- that's some of the security and there's some generalized sense that the president has to act. This is an action that we believe, and I think the historical record would demonstrate, is closely tied to the president's Article II powers as commander in chief.

Throughout history -- and I'm sure I don't need to educate you on this. Throughout history, the role of surveillance, of intelligence gathering is absolutely vital in a wartime effort and it has been utilized by every president through his intelligence officers in every conflict, back to the Revolutionary War and certainly into modern times in World War One and World War Two. Intelligence gathering is absolutely crucial to carry out an armed conflict, which is what we are in. And Congress itself has recognized that in authorizing the president to take all measures necessary and appropriate to detect and prevent terrorist attacks specifically by Al Qaeda.

If you're the president, you say, well, how do I do this? One way is to send the Army to Afghanistan and rout the Taliban. Another is, I have to know if Al Qaeda is going to come again and kill thousands of people on US soil. That's central to my authority and to my responsibility as the commander in chief.

So I don't agree that it is some kind of a generalized unrelated national security matter.

You asked about the state secrets privilege, though. If that is so, is the state secrets privilege necessarily tied to everything that the president's doing. I don't agree that that's also the case. This is a lawsuit where they have challenged a foreign intelligence surveillance activity. We've seen in the last three or four years several other challenges to actions that the president and the administration have taken in the war on terrorism that have been subject to judicial review, mostly involving the detention of --

THE COURT: Usually over the government's objection.

MR. COPPOLINO: Right. But the point is, we didn't assert the state secrets privilege in any of those cases. They cite a number of cases that have been adjudicated involving the foreign powers of the president in the executive branch, none of which involve the state secrets privilege. It is a rare thing that we have to do, but we have to do it where intelligence sources and methods and activities are inherently at issue, such as, when you ask whether a program that is intended to detect Al Qaeda is lawful, you need to know how that program works, how we utilize it.

You made an assumption in your comments earlier that it is a domestic activity. That's a fact issue, your Honor, and I would suggest to you that you cannot just draw a broad conclusion that it is a domestic activity involving US persons until you understand the facts of the program, and all you --

THE COURT: Well, excuse me. Here's where I'm puzzled again. And do help me. I understand that it is peculiar, perhaps, to define some of what is at issue here as domestic because by definition, we're talking about communications that have one end abroad.

MR. COPPOLINO: Right.
THE COURT: But I have taken it, I think accurately, that for purposes of FISA, this is domestic because the other end of the communication takes place in the United States, and however unwise it may be to proclaim that everyone in the United States is not subject to such interception, I guess what I have assumed -- and again, this is not about how the interception is done but -- that Congress is legislating about protecting the communications of United States persons in the United States and not only about where the communication takes place and in that sense it's -- or where the interception takes place and in that sense it's domestic.
MR. COPPOLINO: In that narrow sense, yes, it may well be, but that doesn't render the activity a domestic activity subject to the regulation of Congress. If in fact the target of the surveillance is an agent of a foreign power, which is one of the distinctions the court made, the Keith court made in that case, which said if you have an agent of a foreign power being surveilled, that's the determinative factor that could put this over into the president's side of the authority.
And so I just quibble with the characterization that it is necessarily a domestic matter within the inherent authority of Congress to regulate when in fact, that one end call coming to -- or from the United States, nonetheless may be a matter that involves intelligence information which shows

that an agent of a foreign power is planning to attack the United States. And I would suggest that that remains within the president's authority to find out and do something about and consistent with his constitutional duties.

THE COURT: Okay. Thank you very much. Let me ask some corresponding questions of Mr. Avery, and then I think I will have accomplished at least what I've wanted to today.

Mr. Avery, have I stated your position correctly that the plaintiffs believe that the president has no inherent power to engage in electronic surveillance prohibited by FISA, period, end of story?

MR. AVERY: Yes.

THE COURT: And does that position have to be right for you to win this case without additional details of the program?

MR. AVERY: No.

THE COURT: Why not?

MR. AVERY: Because we have a Fourth Amendment argument that is as powerful, in our view, as the statutory argument.

THE COURT: Oh, yes, but the Fourth Amendment says that the government may not engage in unreasonable searches and seizures. And how on earth am I to decide whether this is reasonable or unreasonable without knowing what it is, without knowing exactly what they're doing?

MR. AVERY: In Keith, the government argued this notion that the Fourth Amendment simply subjects government searches to a general reasonableness test. And the Supreme Court rejected it and said, although that's been argued, we've rejected that.

And the warrant requirement is more than just something that gets thrown in the balance to a general weighing of reasonableness. The warrant requirement is something that you have to meet unless you fall within one of the carefully delineated exceptions.

THE COURT: Yes. But of course, that was then, this is now, and one doesn't have to subscribe to some generalized notion that the world is completely different or we face a threat that is unprecedented and all of that rhetoric to suggest that this is a particular program justified, if at all, by particular circumstances that the court in Keith did not have before it and, necessarily, if that issue were to be revisited today, the court would have to assess, is this a violation of the Fourth Amendment, given whatever it is that the president is doing.

MR. AVERY: Actually, your Honor --

THE COURT: I think it would be very difficult to get at that without some details of the program.

MR. AVERY: Actually, in Keith, the government argued that there had been over 1600 bombings between January 1st of

1971 and July 1st of 1971 and that we were in the midst of an unprecedented wave of domestic terror, to which the president was responding. This argument that our time is the worst time is something that the government has made, you know, from the Alien and Sedition Acts up till the present.

THE COURT: There have been times to try the souls of men before this one. I appreciate that. But nevertheless, I don't know that the broad dictum from prior cases necessarily covers all new situations. But that's not -- I think I've gotten distracted in a sense. I perhaps asked the question imprecisely. I did not mean in asking you does the no inherent power position have to be right for you to win. I wasn't taking into account the separate constitutional argument that you've got.

MR. AVERY: Right.

THE COURT: I mean, with respect to the FISA plus or minus Article II issue.

MR. AVERY: Correct.

THE COURT: Mr. Coppolino is suggesting that if there remains any residual power in the president to conduct electronic surveillance without Congressional approval or, in the face of Congressional disapproval, that then the state secrets privilege clicks in because then we'd have to assess exactly what is he doing at this point and how far does that go or not go, and what I was asking is, in order to avoid the state secrets issue, anyway, don't you have to be right that FISA, A, prohibits whatever it is they're doing and, B, exclusively occupies the field such that the president has no remaining power?

MR. AVERY: I don't think so, your Honor, and I'd like to say why. First, with regard to whether FISA does occupy the field, we think Hamdan is a pretty complete answer to that question, that if Congress had completely occupied the field with regard to establishing the universal code of military justice, such that the president could not set up these tribunals with rules different than the code of military justice supplied, the Supreme Court said in footnote 23 in Hamdan, well, then, the president has no power to do that. And we think this is, by analogy, the same situation.

I actually thought when you asked Mr. Coppolino about oral interrogation that you were referring to the interrogation at Guantanamo, not something that someone might overhear Mr. Kadidal talking about with one of his clients, because I thought that was a very apt analogy. But even if that's not correct, even if the result of this case isn't completely controlled by Hamdan, which is our initial position, then, it seems to me, we still can answer the question based on first principles without getting into the question of what exactly is the president doing in this particular case. Mr. Coppolino, for example, in his argument, seemed to suggest that in enacting FISA, Congress was acting in an area where its constitutional power was uncertain or not clearly established.

THE COURT: I don't know if he said that here today exactly, but he did say it in the brief.

MR. AVERY: And I thought it was implied in what he was arguing here. We think Congress's power in this area is very clear. First, as a regulation of the regulations of the land and sea forces -- by the way, it was a Congressional enactment that established the National Security Agency. National Security Agency is a creature of a Congressional statute. So for Congress to make, pass laws regarding what the National Security Agency can do is not a constitutional stretch.

Secondly, the commerce power and the ability to regulate foreign commerce, which was, after all, what Congress was relying on in Little v. Barreme, when it told the president -- I thought when you were questioning Mr. Coppolino, I can't remember now whether it was what you said or what he said, but as a description of what Congress can do, it was to guard it. I mean, in Little v. Barreme, the Supreme Court sustained a statute in which Congress told the president, you can seize ships coming from France, but -- no, going to France but not coming from France, which is a pretty intrusive regulation of what the president's doing with regard to foreign affairs and military policy, and that was sustained by the

Supreme Court.

So I think that Congressional bona fides in this area with regard to FISA are very well established and indeed the Supreme Court assumed as much in Keith when it said Congress can pass statutes regulating, you know, the interception of domestic --

THE COURT: Once again, I'm not sure that's exactly what I was asking. I think you're answering the question does Congress have the power to enact FISA, and if it does, is that supreme over whatever the president is doing. I guess what I was trying to get at is, I take it that if you are right, that the president has no residuum of power to engage in electronic surveillance that would violate FISA that it requires no further facts about the program other than a concession by the government, that this violates FISA, which apparently the government is now saying it has not made it.

MR. AVERY: Although we say it did make it, at least if Mr. Coppolino's statement that the government officials were telling the truth --

THE COURT: Okay. Can you tell me where, if at all, the government has conceded that whatever it's up to is in violation of FISA.

MR. AVERY: Yes. In the briefing that the Attorney General Alberto Gonzales and General Hayden gave the press, the attorney general stated as follows: "Now in terms of legal authority --" and this is, by the way, at page 9 of our initial brief. This is the attorney general. "Now in terms of legal authorities, the Foreign Intelligence Surveillance Act provides requires a court order before engaging in this kind of surveillance that I've just discussed and the president announced on Saturday. Unless there is somehow -- there is unless otherwise authorized by statute or Congress, that's what the law requires." So we take that as a statement by the attorney general that at this press briefing, where they were discussing the TSP, that he acknowledged that this is the kind of surveillance that the Foreign Intelligence Surveillance Act provides requires a warrant.

There are also statements there from General Hayden that are corroborative of that, which are also in our brief.

THE COURT: Okay. So if we were to take that as a concession that this program violates FISA --

MR. AVERY: Yes.

THE COURT: -- then your primary position is that there is no remaining constitutional authority to the president that would under any circumstances authorize the president to ignore FISA as a matter of any kind of Article II inherent power whatsoever.

MR. AVERY: Yes. And the reason I was talking about Little v. Barreme and so on is because I wanted to say that is a question which has to be answered by resort to first principles, not by examining the particulars of what the president is doing in this case. In other words --

THE COURT: Well, I think it's analytically necessary that that proposition you have to be right about, that answering the question does the president have flatly no power or not is not something that requires knowing exactly what it is he might be up to. He either has some power or he has no power. And that I think is a matter of law, a matter of constitutional principle. But if there is any power left, then we get into some dicey issues about what that power might encompass and whether some particular, for the sake of the argument, extremely narrow program, whether that might come within that power.

MR. AVERY: One might make an argument, for example, the ticking bomb hypothetical, much favored by the government in these discussions. The ticking bomb hypothetical that the president has some power in the face of an imminent attack to conduct some surveillance that's necessary, even some interrogation that's necessary in order to forestall that imminent attack, but that's far short of saying that the president has the power to create a program that lasts for five years, that is as broad as the one they've described. Now whereas the --

THE COURT: It's a rhetorical leap, in other words, from the ticking bomb to the proposition that whatever is necessary to ward off any attack, however distant, however hypothetical, whatever the circumstances might be.

MR. AVERY: Yes, yes. And what we're really talking about here is a program that's been going on for five years, during which time the executive has not gone back to Congress and asked them to amend FISA, to provide whatever tools they say they need. Whatever they say the secret papers, documents they need, they have not gone to Congress for five years to ask for that. And I'd like --

THE COURT: They say they don't need to. I mean, look, if we're having some political debate here --

MR. AVERY: No.

THE COURT: I understand the proposition, and I think all participants do and should. I think the government understands that in this court of law we're not debating whether it's wise for the president to have this power or unwise or whether Congress could have done something or whether Congress should have done something or whether, if the president had asked for this power, Congress could have given it to him and should have given it to him. We're debating a rather abstract but rather vital issue, which is, does the president have the power to do something, notwithstanding that, at least for the purpose of this hypothetical, Congress has said, thou shalt not have this power?

MR. AVERY: Yes.

THE COURT: That's what we're talking about.
MR. AVERY: Yes. And I wanted to make not a political argument but a constitutional argument about why the president has to go back to Congress. And it has to do with the -- as Justice O'Connor said in Hamdan, it has to do with the fact that when we're talking about civil liberties and when we're talking about individual rights, all three branches have to be involved in making these kinds of decisions. If the president is forced to go back to the Congress to amend FISA, then there's going to be some vetting of the president's arguments in Congress.
The president -- I have no idea, of course, what's in the secret papers that they've filed with you, whether it's technology or whether it's data about Al Qaeda. I have no idea what it is. But I do know this: And that is that in our constitutional system there's something wrong with saying, we have to take the president's word for the fact that that requires him to go around FISA. If instead the courts say to the president, you must go to Congress to get FISA amended, then there's going to be a hearing, there's going to be an opportunity for contrary evidence to be presented, there's going to be expert testimony, civil liberties advocates will be heard, as well as people charged with protecting the national security, the credibility of the president's claims can be heard, in Congress, or, if you will, they could be heard at the

FCC. If the government decided to do this by amending CALEA instead of amending FISA, by requiring telecommunications companies to change their technology so that they can do whatever they want to do through CALEA, then there would be hearings in front of the FCC and maybe ultimately in front of Congress. But in one way or another, there would be something other than the unilateral, unfettered, unexamined decision of the executive to expand the scope of these intrusions into private conversations. And that I think is a fundamental element of our constitutional system.

THE COURT: Isn't that a much stronger argument than the Fourth Amendment argument, at least in terms of the structure of government? Because in the Fourth Amendment argument, what you're essentially saying is that the courts should rule as a matter of constitutional law that even if Congress -- we went through that process that you've just described and Congress formally approved this program and the elected representatives of the people, with the concurrence of the president, authorized this behavior, then you'd be asking the courts to rule as a matter of the majestic generalities of the Bill of Rights that nevertheless, this can never be done, and notwithstanding whatever the consequences to the national security might be, whereas this other argument is one that says, it's really on them at this point to be asking the Court to somehow strike down the product of the political process and to say, on the basis of the sort of majestic generalities of Article II, that FISA is somehow unconstitutional if it purports to occupy this field?

MR. AVERY: Your Honor, Mr. Coppolino has his brief and I have mine. I'm not going to waive the Fourth Amendment.

THE COURT: Of course you're not.

MR. AVERY: But I'll agree with you that today I like the separation of powers argument better, absolutely.

THE COURT: At least if I do, you do.

MR. AVERY: No. I do anyway. But I might be back here in ten years arguing the Fourth Amendment argument, and I'm not waiving that. And I'm also, you know, passionate about it.

But I like the separation of powers argument. I like the separation of powers argument better. And I think that --

THE COURT: Okay. But there's really nothing -- and it's hard for me to even come up with hypotheticals that aren't somehow absurd. But you've got a Taliban commander in Afghanistan who's on the battlefield and for whatever reason consults somebody in the United States about what tactics he should follow. Congress can say, you can't listen in to that conversation and the president has no inherent power to say, I want my spy technology to pick that up and relay to the American commander on the field, here's what the other guy's about to do. That there's just nothing, there's no example that you can think of, if this program is so narrow that it's focused only on Osama bin Laden and one other guy and the president has authorized the NSA that whenever you hear Osama bin Laden on the telephone, and we're hypothesizing that there's some technology which will enable them to do it, if he's calling -- we don't care if he's calling the United States or who he's calling or what he's doing, you get on that call. If that violates FISA, the president has no authority to tell his spy satellites to do that, or whatever he's got.

MR. AVERY: I think I've acknowledged that in the case of an imminent attack that the president may have some power because of exigent circumstances, and one reason I'm prepared to acknowledge that is because I think it fits comfortably within Fourth Amendment doctrine. Not to go back there, but it fits comfortably within Fourth Amendment doctrine. Other than that, no, I don't acknowledge any other hypotheticals.

THE COURT: And how do we know that this program is not limited to imminent attack situations? Is there something in the public record that has said that?

MR. AVERY: Well, General Hayden has taken it well beyond that in terms of what he's described. And we have several quotations in our brief from him to that regard. They have said that they want to -- let's see. Actually, this was Alberto Gonzales. Whenever they have a reasonable basis to conclude that one party to the communication is a member of Al

Qaeda, affiliated with Al Qaeda or a member of an organization affiliated with Al Qaeda or working in support of Al Qaeda, that they will listen.

THE COURT: That they will or that they are, the president is authorizing, and is that an important distinction made?

MR. AVERY: I don't have the whole quotation, I'd have to go back and look, but Hayden said the trigger is quicker and a bit softer than it is for a FISA warrant. So, you know, I --

THE COURT: I take it -- I mean, I don't know, maybe you don't want to concede this, I don't know, but if there was a conversation such as I just described where Osama bin Laden in person is calling someone in the United States, I take it the trigger for a FISA warrant would be easily satisfied.

MR. AVERY: Sure it would.

THE COURT: And what you're saying is that by definition, it has been conceded that the trigger is somewhat softer than that.

MR. AVERY: Yes.

THE COURT: So my hypothetical, at least that version of my hypothetical, is one that doesn't require this program.

MR. AVERY: That's right. But the reason -- but I'm not eager to get into that debate because then Mr. Coppolino will say, now Mr. Avery has in effect conceded that the facts matter.

THE COURT: Exactly.

MR. AVERY: And I'm not conceding that. What I'm saying is that FISA provides a very flexible program between the 15 days once a war's broken out and the 72 hours. As a matter of fact, the government didn't think 72 hours was -- didn't think 24 hours was long enough, it went back and got 72 hours as an amendment to FISA. It could go back again.

My point is, to the extent that facts matter, they should tell Congress about it. And they should get an amendment to the statute if Congress agrees. And if Congress doesn't agree, maybe what they're asking for is wrong.

THE COURT: Well, again, that may or may not be right, as a matter of prudence or constitutional government. But when I'm talking about the facts, I'm talking about in this litigation, the assertions of privilege that are being made, and we can't, I think, sort of prejudge it must be illegal and therefore they should go back to Congress and therefore they shouldn't have a privilege to cover this. At least the government's position is, in order to decide if it's legal, we have to know more about exactly what they're doing than has been disclosed so far and we are asserting the privilege.

And this gets sort of back to something I asked Mr. Kadidal about earlier, which is, without suggesting you conceded anything, I've read the briefing that the plaintiffs have submitted as trying pretty hard to avoid coming head on at the assertion of privilege and arguing, we can win this case even if they're entitled to assert privilege about essentially anything they want to assert the privilege about because we win the case based on what's here. And I've been trying very hard to test that proposition by putting these issues about, you know, what is it that you have to be asserting for that to be the case. Now I guess I'd like to at least --

MR. AVERY: I'm asking myself how I'm doing on the test so far.

THE COURT: I'd like to at least give you the opportunity to present an argument, if there is one, as to why the assertion of the privilege should somehow not be respected, because almost everything that we've discussed here so far today has been on the assumption, on my part, for purposes of this argument, that the assertion of privilege is valid.

Now is there any contest about that, point 1, and point 2, do we need to reach that issue at all in order to authoritatively resolve all the motions -- in your view, in order to authoritatively resolve all the motions that are before me?

MR. AVERY: I think what I'm about to say is responsive to what you're asking, and if it's not, I believe you'll interrupt me and redirect me, but --

THE COURT: I think it's a complicated question, and it's fair to answer it however you want to answer it.

MR. AVERY: This is the first time that the government has asserted the state secrets privilege in connection with the argument that Congressional regulation of the president's otherwise whatever-might-exist power to engage in this kind of warrantless electronic surveillance -- whether or not that exists. In fact, it didn't even assert the state secrets privilege in any of the cases that predated FISA, including the Tran case, which was a case that sort of straddled the enactment of FISA. All those cases were decided by going back and reading the Federalist Papers and, you know, those two cases that they -- their name slips my mind for the moment but the cases about the president's -- Curtiss-Wright and the airlines case, and all these other cases about general principles. And in Tran, not only that, but in Tran, the government came to the court -- it's very interesting to read the government's brief in Tran. We cited it in our memorandum but we didn't quote from it. They embrace FISA. They embrace the process by which FISA is enacted. They say that they've been working with Congress to develop this system. And they conclude that the bill provides a workable procedure for judicial review and possible rejection of executive branch certifications for surveillances of US persons. They make the same distinction in their Tran brief. The government in the Tran brief makes the same distinction we're making here between the preFISA regime and the postFISA regime. They say --

THE COURT: That was a different government. I mean, I don't mean to be facetious.
MR. AVERY: Sure, it was Jimmy Carter, and now we have George W. Bush. But --
THE COURT: Yes, but you see, I mean, it's a serious point. The government, the United States, the president, as an institution, I take it is not bound by concessions that, as matters of law, that the government or the president, at a different time, embodied in different people, have asserted in court, right?
MR. AVERY: Correct. I'm not arguing they're bound. I'm arguing that what the government said, what the executive department said in Tran had incredible persuasive force. That's what I'm arguing. And --
THE COURT: Look, it's fair enough for you to argue -- I'll make it for you. I think it's a perfectly reasonable argument that for all these years the government has gotten along without doing certain things, as far as we know, without asserting certain privileges and so on. And that's a kind of historical argument akin to the argument that Mr. Coppolino is making about here's what presidents have done over time. It gives some institutional texture to --
MR. AVERY: Marshall made this argument repeatedly in his early decisions about the history that leads up to something.

THE COURT: And it's relevant.
But I guess I do want to bring you back to this question. Are you saying that there is -- as to the sort of stuff that's on page something or other of the government's papers, I think page 15, they list, here's the kind of thing that we're asserting privilege about and Mr. Coppolino has reasserted it today. The actual mechanisms of what they're doing, who's being listened to and who isn't being listened to, all those details, are you saying that's not something that they can assert privilege about under Reynolds?
MR. AVERY: I'm saying they can assert the privilege. I don't think that the Court needs to look at those privileged documents to decide this case. I think they can assert the privilege. I think it's the use of the argument that you have to see those privileged documents to decide this case that's opportunistic and it's that opportunism that I was trying to call attention to by going back and saying, at a time when their own actions weren't being questioned, at a time when the executive department's actions about this weren't being questioned -- they were being questioned about something else in Tran but not about this -- they didn't make that argument. And the presidents and the attorneys general from then until now have not made the argument. The argument's being made now because it's a way of escaping what I think is inevitable, which is, if you look at the merits, they don't have this power

in the face of FISA.

THE COURT: Well, okay. And I hear the argument. But the point really is not about their motivations, the point really is, can this case be decided without reference to those details. And I think what I'm hearing is, your answer is yes, and your answer is yes because your legal position is that FISA occupies the field, that the president has no remaining power in the face of FISA except for certain exigent circumstances that are so narrowly drawn and unique that under no circumstances can what the president and General Hayden and Attorney General Gonzales said in characterizing this program, under no circumstances could be that; that's your position.

MR. AVERY: And there's another reason why my answer is yes, which is that if we look at the other cases where this kind of issue has been drawn, it's been resolved without looking at that level of detail. The steel seizure case, for example. The steel seizure case was resolved without asking, how many bullets do we have left, how many more people will be killed if there's a strike, how long will the steel mills be shut down, I mean, how long does it take to get them going again once they're shut down. None of those questions were addressed. And the answers wouldn't have been trivial. We lost 35,000 people in Korea. The total casualties were almost a million. So it wasn't that it didn't matter. It's that the court said, we're going to answer this on the basis of first principles, not on the basis of how it's going to work out in this particular case. Same thing in Keith.

THE COURT: Because you're saying, as you said -- I guess we're getting to the point of repetition. That's the case they should make to Congress then. If President Truman had wanted to go back to Congress and say, give me the power because I'll have a confidential briefing with the intelligence committee and tell them that we're running out of bullets and we're losing this many men and so on and so forth, and then Congress could authorize it if they agree.

MR. AVERY: And that's precisely what Justice Burger and the other justices said he should have done and that's what we're saying he should do here.

THE COURT: All right. I think I understand the parties' positions. If anybody has two minutes that they think I need to hear, I'm prepared to hear either side.

Mr. Coppolino, is there anything else that needs to be said?

MR. COPPOLINO: I just wanted to close with a procedural point, your Honor, perhaps less dramatically than I would otherwise, and that is that --

THE COURT: Well, I hope you've learned I'm not interested in the drama.

MR. COPPOLINO: That's why I'm not doing it.

THE COURT: Fair enough.

MR. COPPOLINO: I think, you know, you raised a lot of very interesting questions today, and we tried to answer them as best we can. We think our motion to dismiss is well founded and it should be granted, quite obviously. If you're not sure about that or if you indeed disagree with that, and while upholding the claim of privilege don't necessarily think the case needs to be dismissed, I'd ask that you'd at least stop there before turning to an actual adjudication of the merits on plaintiffs' summary judgment motion because we would like an opportunity to at least react to your reasoning, see if there is some way to proceed and, if not, what other options might be available to us. So rather than replicate the situation which happened in Detroit where the court just rushed to judgment without actually telling us why she was doing it in the face of -- even though she upheld our state secrets claim, proceeded immediately to the merits, we think that was not appropriate and we'd just ask you if you would give us that opportunity after you've ruled to assess the matter further.

THE COURT: Okay. I think I understand what you're asking. The way I've been formulating the questions to people -- and I certainly can't say I've thought any of this through to resolution and I will do so and then you'll get it in the written form that people usually get things from judges. But the way I've been formulating the questions I think has signaled a belief that the merits and the state secrets issue are somewhat intertwined in the sense that, depending on what the legal principles are, the state secrets privilege has greater or lesser bite. If, for example, the conclusion -- I'm just hypothesizing a few things. If the conclusion were the authorization for use of force resolution repeals FISA and authorizes the president to do this and we then have to reach a Fourth Amendment issue, it seems to me that the state secrets issue has a lot more clout as addressed to the question of what would I have to do to decide whether it's reasonable as a Fourth Amendment matter for this to happen.

With respect to the standing issue, it may be that the issue of the plaintiffs' standing could be resolved in a way favorable to the government, for example, without addressing any state secrets issue and maybe, although I think there have been a number of interesting questions raised about that, maybe it could be resolved on certain theories, if I accepted them, favorable to the plaintiff without there being so much bite to the state secret issue.

So when you say addressing the merits, I think what you're asking is, whatever legal framework I might think is appropriate to the case, if I think the case does not need to be dismissed, you are asking for an opportunity on behalf of the government to make a potentially -- if you decided it was wise, a second summary judgment submission that might address more facts if it seemed appropriate, or something like that,

that I haven't got yet?
MR. COPPOLINO: Correct. I'm asking that you not decide their summary judgment motion on the merits and that you allow the government to react to whatever you do decide. As you say, it may be dismissal, but if it's not dismissal, that we then have the opportunity to respond further before we go to judgment. And I'll --
THE COURT: Or -- and I think I understand exactly what you're saying and it's just a matter of quibbling. I just want to make sure I understand it. That before entering some final judgment, because I have no idea at this point how I'm going to come out on this, and I'm not going to make a precommitment that it might not be to conclude as a matter of law that on the papers before me the plaintiffs seemed to be correct on everything. Suppose I found that, that you're asking, even under those circumstances, that I not enter a judgment or an injunction or anything dramatic until you've had a chance to react to that. And if I point to anything less than that they're right on everything else, that it might well be that it necessitates, as a matter of my analysis, that you have such an opportunity. But I think that's what I'm hearing you saying.
MR. COPPOLINO: That is what I'm saying. And just so it's clear, at this stage of the proceedings and where the different motions line up, we just thought it was untenable to

expect us to both assert privilege and to respond to summary judgment where the issue of what evidence is and is not at play isn't resolved, that we would either have to defend the merits without facts that we think are classified or declassified facts, which we wouldn't do. That's why the summary judgment at this posture we thought was simply not appropriate or the logical way to proceed.

So all I'm asking is, as you have outlined that you may agree with us and dismiss the case or do something along that continuum, but certainly, if there's going -- let us react to what you do before we proceed to a merits adjudication. That's all.

THE COURT: Okay. And again, depending on what you mean by merits adjudication, I think we're in agreement or at least I'm in agreement that there are many circumstances, maybe all, in which it would be appropriate to give the government an opportunity to respond, including, but not exclusively, by declassifying certain information that might be necessary to respond. But I'm not bargaining about this. You'll decide what you have to do --

MR. AVERY: Yes.

THE COURT: -- in response to whatever the Court's ruling is. And I take it that other than the general sense of urgency, the plaintiffs don't really have an objection to that, at least if Mr. Coppolino's request is interpreted to encompass the possibility that I say, gee, you guys seem to be right about everything but I'll give them one last shot to tell us what's really going on here if they choose to.

MR. AVERY: Well, their motion for a stay of our summary judgment motion was denied.

THE COURT: Denied, I know, and they passed on the opportunity to provide, even ex parte, even on a classified basis, a further summary judgment request. But --

MR. AVERY: And we are talking about, you know, the important rights of our clients. So I'm not --

THE COURT: You're not waiving anything, okay. But I'm telling you --

MR. AVERY: I can read the handwriting on the wall.

THE COURT: Yes. You know, these are matters of great importance.

MR. AVERY: Of course.

THE COURT: And I don't think they should be decided on the strength of some notion of favor or some notion that the time for the government to do this was last week. If, hypothetically, they were to come in and say, see, here's what the program really is and you have nothing to fear and you were to hypothetically look at it and say, yeah, you're right, we have nothing to fear but fear itself and we're all on board at that point and the case goes away, that might have terrible consequences because they are now disclosing something or whatever, but, you know, certainly I shouldn't be enjoining the president of the United States from doing something if, under some hypothetical set of circumstances, they can come forward and make another presentation.

MR. AVERY: I'm not pressing some absurd procedural position.

THE COURT: Okay. Then I think I understand what Mr. Coppolino is requesting and I think at this point I can take all of these motions under advisement. And thank you all very much.

MR. AVERY: You were going to give --

THE COURT: That's right. You didn't get your chance to make your either dramatic or undramatic request.

MR. AVERY: Well, I know you don't like drama so I'll just say this, which is that I think our position can be summed up very simply, both with regard to the state secrets argument and with regard to the merits of the case, and that's the position that balancing the need for security against the protection of civil liberties is not something that our constitutional system entrusts to unilateral decision-making by the executive, or, as Justice Powell put it in Keith, the Fourth Amendment does not contemplate the executive officers of the government as neutral and disinterested magistrates. And that's what I think the core of this case is.

Not just to make a rhetorical point but, I mean, if

Alexander Hamilton were alive, he'd be here listening to this argument. This is the central issue of American government. And that's our point of view on that.

THE COURT: Okay. Point taken. Again, I thank everyone. I think it has been a very informative and wonderful argument, really, conducted at a very high level of intellect and also at a level of dispassion that I think reflects wonderfully on the bar and on all the lawyers who have participated because these are intensely emotional issues, they're very important issues, they're issues that have what I call an ideological underlay that goes back to the founding of the republic and different attitudes about our Constitution that have existed throughout that period. And anyone would be blind not to recognize that there are significant political overtones to any decision the Court makes in the sense of how the public may react to those decisions, but I think that the way the parties have conducted themselves this afternoon demonstrates that the law can get past that political set of overtones, that there may be no getting past the sort of poor decisions about how our institutions of government work, and there are different philosophies about that that surely infuse every position of everybody in this matter. But certainly this argument has demonstrated that we can conduct that discussion in a way that is independent of the partisan politics of the moment, and I very much thank counsel for that way of proceeding.

Decision will be reserved. And thank you very much.

MR. AVERY: Thank you, your Honor.

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